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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 736. ~~421~~ 96

THE DESERET SALT COMPANY, PLAINTIFFS IN ERROR,

vs.

D. P. TARPEY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED SEPTEMBER 10, 1888.

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INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from district court	1	1
Complaint	1	1
Answer	2	2
Verdict	3	2
Judgment	3	3
Notice of motion for new trial	4	3
Statement on motion for new trial	5	4
Exhibit 2—Deed between the Central Pacific R. R. Co. and D. P. Tarpey, Aug. 7, 1885	6	5
Exhibit 3—Plat	10½	9
Testimony of D. Webb	12	9
Henry Atkinson	12	9
Exhibit 4—Articles of association, &c., of the Central Pacific R. R. Co. and Western Pacific R. R. Co., June 22, 1870	12	10
Exhibit 5—Articles of association, &c., of the Central Pacific R. R. Co. and the California and Oregon R. R. Co. *et al.*, Aug. 20, 1870	21	16
Testimony of D. P. Tarpey	28	22
J. Fewson Smith	29	22
John Sparks	29	22
Geo. Y. Wallace	29	22
Prayers for instructions by plaintiff	30	23
Defendant's requests granted	33	25

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INDEX.

	Original.	
Assignment of errors	35	
Stipulation as to statement	37	
Order overruling motion for new trial	37	
Notice of appeal	37	
Clerk's certificate	37	
Stipulation as to record	38	
Order to put cause on calendar	38	
Hearing	39	
Submission	39	
Judgment	39	
Order fixing amount of bond	40	
Opinion	40	
Citation of service	42	
Assignment of errors	57	
Writ of error	58	
Bond	61	
Clerk's certificate	63	
	65	

ginal.	Print.
35	26
37	28
37	28
37	28
38	29
38	29
39	29
39	29
39	30
0	30
0	30
2	30
7	35
8	36
	37
	38
	39

a In the Supreme Court of Utah Territory. January Term, 1888.

D. P. TARPEY, Plaintiff and Respondent,
vs.
DESERET SALT COMPANY, a Corporation, Defendant and Appellant.

Transcript.

P. L. Williams, attorney for appellant.
C. S. Varian, attorney for respondent.

Filed this 13 day of January, 1888.

E. T. SPRAGUE,
Clerk Supreme Court.

1 In the First District Court, Territory of Utah, County of Weber.

D. P. TARPEY, Plaintiff,
vs.
DESERET SALT COMPANY, a Corporation, Defendant.

Complaining of defendant, the plaintiff above named alleges—

That the defendant at all the times hereinafter mentioned was and now is a corporation, organized and existing under the laws of the Territory of Utah.

That ever since the first day of August, A. D. 1885, the plaintiff was and now is seized as of fee and entitled to the possession of the following-described lands and premises, situated in the county of Box Elder and Territory of Utah, to wit:

Northwest quarter of fractional section nine (9), in township eleven (11) north, range nine (9) west, Salt Lake base and meridian, and the northeast quarter and the southwest quarter of said section, in part covered with water, in all three hundred and eighty acres, more or less.

That thereafter, on said day, the defendant unlawfully entered into possession of said lands and premises and ever since has unlawfully withheld and now unlawfully withholds the possession thereof from this plaintiff, to his damage in the sum of two thousand dollars.

2

That the value of the rents, issues, and profits of said lands and premises is one thousand dollars per month from said first day of August, A. D. 1885.

The defendant has not paid said damages, rents, issues, and profits, nor any part thereof, although requested so to do.

Wherefore plaintiff demands judgment against defendant—

For the recovery of the possession of said lands and premises;

For the sum of two thousand dollars damages and the sum of twenty-five hundred dollars rents and profits, and at the rate of one

thousand dollars per month from date hereof, together with his costs of suit.

DICKSON & VARIAN,
Attorneys for Plaintiff.

(Duly verified.)

Endorsed: Title of court and cause. Complaint. Ejectment. Filed October 17th, 1885. A. C. Emerson, clerk. Dickson & Varian, attorneys for plaintiff.

(Title of court and cause.)

And now comes the said defendant, by the undersigned, its attorneys, and for answer to the complaint of the plaintiff on file herein, according to its information and belief, denies that ever since the first day of August, A. D. 1885, or at or during any other period, the plaintiff was or that he now is seized as of fee or otherwise or entitled to the possession of the lands and premises mentioned and described in said complaint or any part thereof.

Denies that this defendant at the said or any time unlawfully entered into the possession of the said lands and premises, or any part thereof, or that it has ever since said date or at any time unlawfully withheld or that it now unlawfully withholds the possession thereof from the said plaintiff, to his damage in the sum of two thousand dollars or any other sum.

And this defendant further denies that the value of the rents, issues, and profits of said lands and premises is one thousand
3 dollars per month, or any other sum whatever, from the said first day of August, A. D. 1885, or from any other date or time.

Wherefore the said defendant prays to be hence dismissed with its costs herein.

WILLIAMS & YOUNG,
Attorneys for Defendant.

(Duly verified.)

Endorsed: Title of court and cause. Answer. Filed December 12th, 1885. A. C. Emerson, clerk. Received a copy of the within this 12th day of December, 1885. Dickson & Varian, attorneys for plaintiff. Williams & Young, attorneys for defendant.

(Title of court and cause.)

Verdict.

We, the jury empaneled in the above-entitled cause, do find for the plaintiff, and that he do recover from the defendant the possession of the lands described in the complaint, together with damages for the use and occupation of the premises from August 1st, 1885, in the sum of ($500.00) five hundred dollars to date.

W. W. FUNGE, *Foreman.*

Filed October 26th, 1887.

(Title of court and cause.)

Judgment on Verdict in Open Court.

TWENTY-SIXTH DAY OF OCTOBER, A. D. 1887.

This action came on regularly for trial. The said parties appeared by their attorneys, C. S. Varian, counsel for plaintiff, and P. L. Williams, for defendant. A jury of twelve persons was regularly empaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of
4 the court the jury retired to consider of their verdict, and subsequently returned into court, and, being called, answered to their names and on their oaths say: "We, the jury empaneled in the above-entitled cause, do find for the plaintiff and that he do recover from defendant the possession of the lands described in the complaint, together with damages for the use and occupation of the premises from August 1st, 1885, in the sum of ($500.00) five hundred dollars to date. W. W. Funge, foreman."

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said plaintiff, D. P. Tarpey, do have and recover from said defendant, The Deseret Salt Company, the following-described lands, to wit: Northwest quarter of fractional section nine (9), in township eleven (11) north, range nine (9) west, Salt Lake base and meridian, and the northeast quarter and the southwest quarter of said section, in part covered with water, in all three hundred and eighty acres, more or less; together with damages for the use and occupation of the premises from August 1st, 1885, in the sum of ($500.00) five hundred dollars to date, and costs and disbursements incurred in this action amounting to the sum of — dollars.

(Title of court and cause.)

To C. S. Varian, Esq., attorney for plaintiff:

You are hereby notified that the said defendant will move the court to vacate and set aside the verdict and judgment in the above case and grant a new trial therein upon the following grounds, to wit:

First.

Insufficiency of the evidence to justify the verdict.

Second.

Said verdict and judgment are against law.

Third.

Error in law occurring at the trial and excepted to by the defendant.

5 The said motion will be made upon a statement of the case to be hereafter prepared.

Nov. 5th, 1887.

P. L. WILLIAMS,
Attorney for Defendant.

Endorsed.

Copy received this 5th day of November, 1887.

C. S. VARIAN,
Attorney for Plaintiff.

Filed November 5th, 1887.

H. H. HENDERSON, *Clerk.*

(Title of court and cause.)

Statement on Motion of the Above-Named Defendant for a New Trial, and to be Used as and Constitute a Statement on Appeal from the Final Judgment in the Above-Entitled Action.

Said cause came on regularly for trial in said district court and was tried by a jury, beginning on the 15th day of October, 1887, and was concluded on the 26th day of said month. Upon said trial the following statement of facts were agreed to and the following testimony was introduced and proceedings had and exceptions taken, to wit:

It was stipulated by and between the parties that the map of definite location of the line of the Central Pacific Railroad Company of California was filed and accepted, as required by the acts of Congress, on the 20th day of October, 1868, and that the land in controversy in this action was in an alternate section within ten miles from said line of railroad.

The plaintiff, to maintain the issues on his part, introduced in evidence a mortgage or trust deed of all of the lands belonging to said company, under the grants of Congress, bearing date the 1st day of October, A. D. 1870, between the Central Pacific Railroad Company, a railroad corporation organized pursuant to the laws of the State of California, the party of the first part, and Charles Crocker and Silas W. Sanderson, both of the said State of California, parties of the second part, which mortgage or trust deed was acknowl-

6 edged and marked as recorded at Brigham City March 12, 1873, and purported to be given to secure the bonds of said company.

Plaintiff also offered in evidence a lease, bearing date the 7th day of August, A. D. 1885, by and between the Central Pacific Railroad Company, a corporation organized as aforesaid, party of the first part, and the plaintiff, D. P. Tarpey, of the Territory of Utah, party of the second part; which lease was in the words and figures following, to wit:

EXHIBIT 2.

This indenture, made this seventh day of August, A. D. 1885, by and between the Central Pacific Railroad Company, a corporation organized under and by virtue of the laws of the State of California, party of the first part, and D. P. Tarpey, of the Territory of Utah, party of the second part, witnesseth:

That for and in consideration of the rents hereinafter reserved and of the covenants, conditions, and stipulations upon the part of the party of the second part to be by him severally kept and performed, the party of the first part does hereby lease and remise unto this party of the second part, for the term of five (5) years from and after the first (1st) of January, A. D. 1886, all of those certain lands and premises situate, lying, and being in the Territory of Utah, and particularly described as follows, to wit:

All of the land granted by the Government of the United States to the party of the first part in the Territory of Utah lying west of the east line of range five (5) west, Salt Lake meridian, save and excepting therefrom all lands patented or sold or contracted to be sold at this date; also all lands granted to the party of the first part in range four (4) west, not sold or contracted to be sold or under lease to any other party at this date; also all lands granted to the party of the first part in township eight (8) north, of range one (1) west; also all lands granted to the party of the first part in township eight (8) north, of range one (1) east; also all the land granted to the party of the first part not sold, contracted to be sold, or under lease in township nine (9) north, of range one (1) east; and also all the land granted to the party of the first part in townships seven (7), eight (8), nine (9), ten (10), and eleven (11) north, of range
7 two (2) east, excepting and reserving from the operation of this lease the right of way of the party of the first part and all other lands used for railroad purposes.

The rent to be paid by the party of the second part during said term of lease shall be five thousand dollars ($5,000) per annum, payable as follows:

One thousand dollars ($1,000) payable in advance, one thousand five hundred dollars ($1,500) on the first (1st) day of January, 1886, and two thousand five hundred dollars ($2,500) on the first (1st) day of July and January of each year during the continuance of this lease.

And it is hereby agreed that if any rent shall be due and unpaid or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter said premises and remove all persons therefrom.

And the said party of the second part does hereby covenant, promise, and agree to pay to the said party of the first part the said rent in the manner hereinbefore specified, and at the expiration of said term to quit and surrender the said premises in as good state and condition as reasonable use and wear thereof will permit (damage by the elements excepted).

Said party of the second part does further covenant that he will

not commit or suffer to be committed any waste or devastation of said premises or any part thereof.

Said party of the second part does further covenant that he will at once commence to reduce all of the demised premises to actual possession, and will continue so to do until he shall be in actual possession of the whole thereof, and to this end and at his own proper cost and expense, but in the name of the said party of the first part, shall and will commence and diligently prosecute any and all actions at law, suits in equity, or such other legal proceedings as may be necessary and proper in the premises; also that he will, at his own proper cost and expense, commence and diligently prosecute, in the name of the said party of the first part, any and all necessary actions for trespass, for timber-cutting, and all other actions or proceedings necessary or proper to protect the interests of the party of the first part in the timber upon the demised premises.

And it is further covenanted and agreed that the party of the first part shall have the right to cancel and terminate this lease at any time upon the sale by it of the fee of any portion of the demised premises, or after first having given ninety days' notice of such sale; and upon such sale being made and such notice being given and the expiration of the ninety days, as above indicated, then this lease shall cease and determine and be void and of no effect as to the portion of land sold; but in such an event a rebate shall be made to the proportion the rent value of the land sold bears to the whole amount of lease money, and in estimating the rent value of the land sold all portions of the lands subject of this lease shall be deemed and estimated to have equal rent value.

And it is further covenanted that the party of the first part shall have the right to terminate this lease at any time if the party of the second part shall at any time discourage purchasers from purchasing any portion of said lands, or shall at any time declare said lands to be undesirable to purchasers or others, or shall commit any act which shall tend to discourage the sale of said lands or to injure their value in public estimation; and the party of the first part shall be the sole judge as to whether such offense against the covenants of this lease has been committed.

It is further understood that no rebate of the rent rate mentioned in this indenture shall accrue to the party of the second part by reason of adverse holdings of any portion of the demised premises, it being understood that the party of the second part is thoroughly informed as to the present condition of the leased premises with respect of adverse holdings; and no obligation rests upon the party of the first part to place the party of the second part in possession of the demised premises, but in all actions brought by the party of the second part to recover possession of any part of the demised premises the party of the first part will furnish its regular counsel in aid of the prosecution thereof, but will not retain special counsel therein.

The party of the second part shall have the right to sublet the demised premises, but only upon terms of lease strictly conformable

to the covenants herein; and it is mutually covenanted and agreed that all such subleases between the party of the second part and subtenants shall be fully set forth in writing between the parties, and that in all cases the full and true consideration shall be written into the subleases in triplicate, one copy to be retained by the sublessee, one by the party of the second part herein, and one by the party of the first part herein, and such subleases shall have no va-
9 lidity until approved by the land agent of the party of the first part herein, which approval shall be indorsed in writing upon each of triplicate copies, and shall be without validity until such indorsement is made thereon.

This lease and the privileges accruing under it to the party of the second part is by mutual covenant hereby made non-transferable and unassignable, and the party of the second part covenants and agrees that any attempt on his part to transfer or assign the rights acquired thereunder shall make this lease and its covenants voidable at the election of the party of the first part.

In witness whereof the said party of the first part has caused these presents to be signed by its land agent and secretary and its corporate seal to be hereunto affixed, and the party of the second part has hereunto set his hand and seal the day and year first above written.

WILLIAM H. MILLS,
Land Agent Central Pacific R. R. Co.

[CORPORATE SEAL.]

E. H. MILLER, JR.,
Secretary Central Pacific R. R. Co.

Witness: HOLLAND SMITH. D. P. TARPEY. [SEAL.]

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss.*:

On the twenty-second day of September, A. D. one thousand eight hundred and eighty-five, before me, Holland Smith, a notary public in and for the said city and county, residing therein, duly commissioned and sworn, personally appeared William H. Mills, the land agent, and E. H. Miller, Jr., the secretary, of the Central Pacific Railroad Company, a corporation duly organized under the laws of the State of California, whose names are subscribed to the foregoing instrument, and who are personally known to me to be the individuals described in and who executed the said instrument, said Central Pacific Railroad Company being named in said instrument and known to me to be the corporation described therein and that exe-
cuted the same as party thereto, and they, the said William
10 H. Mills and E. H. Miller, Jr., duly and severally acknowledged to me that they executed the same freely and voluntarily as such land agent and secretary and as and for the act and deed of the said Central Pacific Railroad Company, and that said corporation executed the same for the uses and purposes therein mentioned, and that the seal which is thereto affixed is the corporate seal of said corporation and was affixed thereto by authority thereof; and at the same time personally appeared before me D. P. Tarpey,

personally known to me to be the person described in an
cuted the foregoing instrument as a party thereto, and h
edged to me that he executed the same freely and volu
for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and
official seal, at the said city and county of San Francisc
day of September, A. D. 1885.

HOLLAND SMI

[SEAL.] *A Notary Public within and for the City and*
of San Francisco, State of C

Pursuant to its terms the within lease is hereby declar
ceased and determined as to the following lands, to wit:
lands in t'p 10 N., R. 4 W., sold to Dr. F. E. Roche, contract
all of the lands in t'ps 11, 12, and 13 N., R. 4 W.; all lan
ranges 5, 6, and 7 W., and all lands in t'ps 9, 10, 11, and 1
W., sold to Charles Crocker, contract No. 5962; and all
ranges 11 and 12 W., sold to D. P. Tarpey, contract No. 61

WM. H. MILL
Land

Endorsed: No. 125. Lease. C. P. R. R. Co. to D. P
August 7th, 1885. $1,000 on August 7th, 1885; $1,500 on
1st, 1886; $2,500 on July 1st, 1886; $2,500 on the 1st day
ary and July of each year during the continuance of this

Land department C. P. R. R. Co.
San Francisco, August 24th, 1886.

11 The defendant, by its counsel, objected to the intr
of said lease on the ground that there was a variance
the proof offered and the allegations in the complaint, in
plaintiff had alleged seizing in fee to the demanded prem
sought to prove an estate as lessee under said lease for a ter
years only; which objection was then and there overrule
court, and the said lease was admitted in evidence and mark
hibit 2;" to which ruling the defendant then and there e
The plaintiff also proved that the land described in the l
braced the land in controversy.

Plaintiff also offered in evidence selection list No. 6 of l
lected for patent by the Central Pacific Railroad Company a
in the land office at Salt Lake City on the — day of —
which selection included only the surveyed lands containe
tion 9, in township 11 north, range 9 west, Salt Lake meri
wit, the northwest quarter of the northeast quarter, the no
quarter of the southwest quarter, and the northwest quarter
section. To the introduction of such list in evidence the de
then and there objected, on the ground that it was irrelev
immaterial and did not support or tend to support the avern
the complaint; which objection was then and there overrule
court, and defendant excepted to said ruling. The said list
that the costs of surveying, selecting, and conveying the land
lected had been paid, but there was no evidence that any appl

personally known to me to be the person described in and who executed the foregoing instrument as a party thereto, and he acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal, at the said city and county of San Francisco, this 22d day of September, A. D. 1885.

HOLLAND SMITH,

[SEAL.] *A Notary Public within and for the City and County of San Francisco, State of California.*

Pursuant to its terms the within lease is hereby declared to have ceased and determined as to the following lands, to wit: All of the lands in t'p 10 N., R. 4 W., sold to Dr. F. E. Roche, contract No. 6025; all of the lands in t'ps 11, 12, and 13 N., R. 4 W.; all lands in the ranges 5, 6, and 7 W., and all lands in t'ps 9, 10, 11, and 12 N., R. 8 W., sold to Charles Crocker, contract No. 5962; and all lands in ranges 11 and 12 W., sold to D. P. Tarpey, contract No. 6103.

WM. H. MILLS,
Land Agent.

Endorsed: No. 125. Lease. C. P. R. R. Co. to D. P. Tarpey. August 7th, 1885. $1,000 on August 7th, 1885; $1,500 on January 1st, 1886; $2,500 on July 1st, 1886; $2,500 on the 1st day of January and July of each year during the continuance of this lease.

Land department C. P. R. R. Co.

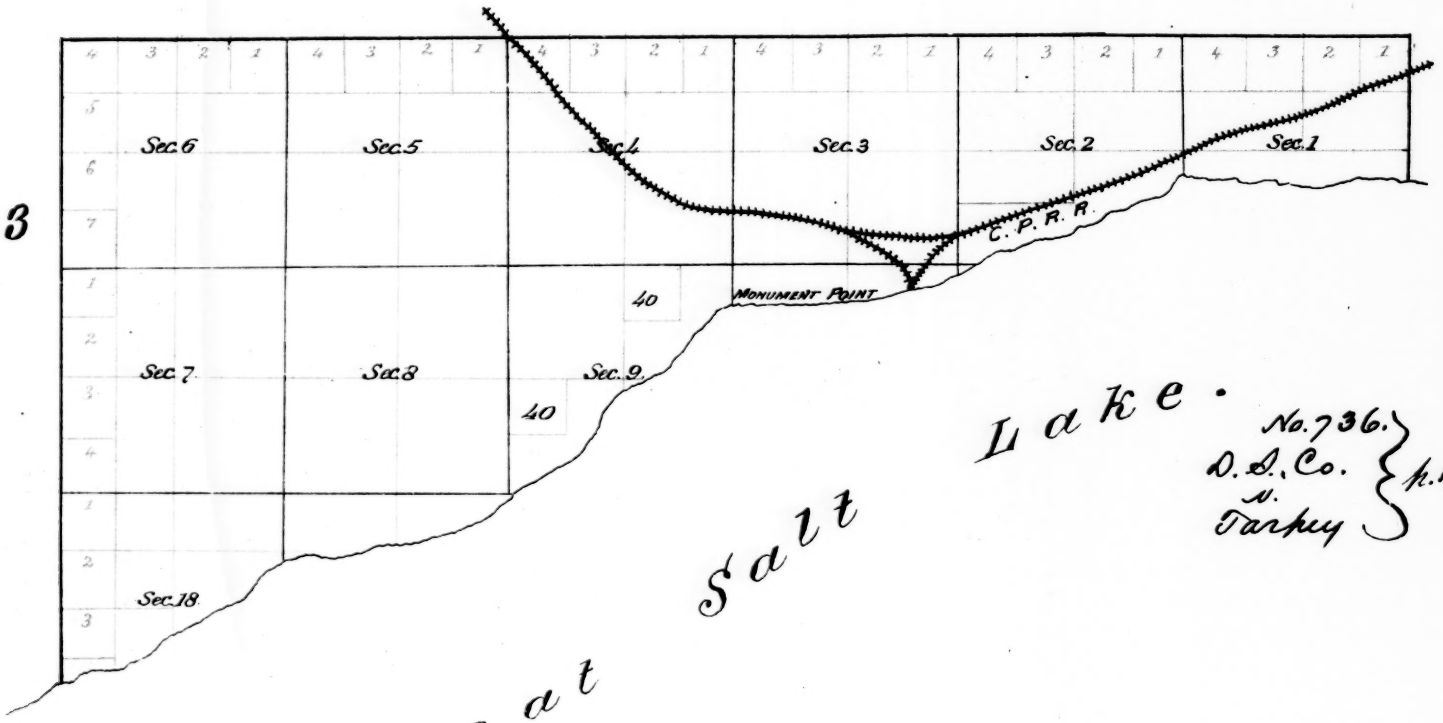
San Francisco, August 24th, 1886.

11 The defendant, by its counsel, objected to the introduction of said lease on the ground that there was a variance between the proof offered and the allegations in the complaint, in that the plaintiff had alleged seizing in fee to the demanded premises and sought to prove an estate as lessee under said lease for a term of five years only; which objection was then and there overruled by the court, and the said lease was admitted in evidence and marked "Exhibit 2;" to which ruling the defendant then and there excepted. The plaintiff also proved that the land described in the lease embraced the land in controversy.

Plaintiff also offered in evidence selection list No. 6 of lands selected for patent by the Central Pacific Railroad Company and filed in the land office at Salt Lake City on the — day of ——, 1885, which selection included only the surveyed lands contained in section 9, in township 11 north, range 9 west, Salt Lake meridian, to wit, the northwest quarter of the northeast quarter, the northwest quarter of the southwest quarter, and the northwest quarter of said section. To the introduction of such list in evidence the defendant then and there objected, on the ground that it was irrelevant and immaterial and did not support or tend to support the averments of the complaint; which objection was then and there overruled by the court, and defendant excepted to said ruling. The said list showed that the costs of surveying, selecting, and conveying the lands so selected had been paid, but there was no evidence that any application

TOWNSHIP No 11 NORTH RANGE No 9 WEST SALT LAKE MERIDIAN

Exhibit 3



No. 736.
D. L. Co.
v.
Farley
} p. 10½

had been made by said Central Pacific Railroad Company to select or have conveyed to it any other of the lands in said fractional section 9, nor that it had paid or tendered the costs of surveying, selecting, or conveying any other of the said lands. At the same time plaintiff introduced five other lists of selection of lands in Utah by said company.

Plaintiff also offered and introduced in evidence the official plat of the Government survey of said fractional section described in plaintiff's complaint, a copy of which plat is hereto attached, marked "Exhibit 3."

(Here follows diagram marked page 10½.)

Plaintiff proved that the east, west, and north section lines of said section 9 had been surveyed by the United States in A. D. 1871; that subdivisions of sections of the public lands are never surveyed by running interior lines; that said section lies on the shore
12 and on the north of the great Salt Lake, and that the south or meander line of said section 9 had not been run.

D. Webb, the register of the United States land office at Salt Lake City, was sworn for the plaintiff, and produced the official plat on file in said office of section 9, described in the complaint herein. He testified that a duplicate of the said selection list No. 6 had been forwarded to the General Land Office for the approval of the Commissioner thereof, but that no action had been taken, so far as he was advised.

Henry Atkinson, a witness produced and sworn on the part of the plaintiff, testified that he was assistant draftsman in the office of the surveyor general of Utah Territory; that he was familiar with the official plats of the surveys of public lands made in the said Territory, and identified the field-notes and official plat of the survey of that portion of the said fractional section 9 which had been surveyed. He further testified that it appeared from said field-notes and plat that only so much of said fractional section had been surveyed for patent as was contained in said selection list No. 6, and above designated, and that the same was returned into the surveyor general's office as agricultural lands.

Plaintiff proved the incorporation of the Central Pacific Railroad Company of California of June 27, 1861, and further offered in evidence a document purporting to be articles of association, amalgamation, and consolidation of "The Central Pacific Railroad Company of California" and the "Western Pacific Railroad Company," bearing date the 22nd day of June, A. D. 1870, in the words and figures following, to wit:

Articles of association, of amalgamation, and consolidation executed this twenty-second (22nd) day of June, A. D. 1870, by and between "The Central Pacific Railroad Company of California," party of the first part, and "The Western Pacific Railroad Company," the party of the second part, both of the said railroad companies being railroad corporations duly organized under and in pursuance of the laws of the State of California.

Whereas "The Central Pacific Railroad Company of California" was duly organized under and in pursuance of the laws of the State of California by filing articles of association in the office of the secretary of state of the State of California on June 28th, 1861, and
13 amended articles of association on the eighth day of October, 1864, to construct, operate, and maintain a railroad and telegraph line through the counties of Sacramento, Placer, and Nevada, in the State of California, "from the city of Sacramento, in the county of Sacramento, in said State, to the eastern boundary line of the State of California, at or near the place where said line crosses the Truckee river, and running through Roseville at the junction of said railroad with the California Central railroad and by or near to New Castle, Auburn, Neilsburg, Illinois Town, Gold Run, Dutch Flat, Bear Valley, Crystal Lake, Summit Valley, and Donner Pass, together with such branches and extensions of the said railroad as the board of directors of said company may at any time deem necessary or proper to construct, operate, and maintain by the laws of the State of California or other States or Territories or the acts of the Congress of the United States now in force or which may hereafter be enacted."

And whereas by the provisions of an act of the Congress of the United States entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved July 1st, 1862, and the acts amendatory thereof, approved July 2nd, 1864, and March 3rd, 1865, the said "The Central Pacific Railroad Company of California" were authorized to locate, construct, and the continue same eastward in a continuous completed line until it should meet and connect with the Union Pacific railroad, and certain rights, powers, donations, grants, rights of way, privileges, and franchises were given and granted to them to aid in the construction of their said railroad.

And whereas on the 23rd of July, 1868, the said "The Central Pacific Railroad Company of California" increased the capital stock of the company from twenty million dollars to one hundred million dollars, the latter amount being necessary for the constructing, completing, operating, equipping, and maintaining said railroad and its extension.

And whereas under and in pursuance of the laws of the State of California "The Western Pacific Railroad Company" was duly organized on the eleventh day of December, 1862, and on the second day of November, 1869, the "San Francisco Bay Railroad Company,"
another corporation organized under and in pursuance of
14 the laws of the State of California, amalgamated and con-

solidated its interests, capital stock, rights, privileges, and franchises with those of the said "The Western Pacific Railroad Company" and formed both of said companies into one new company and corporation to be called and known as "The Western Pacific Railroad Company," the objects and purposes of which were to purchase, construct, own, maintain, and operate certain railroad and telegraph lines so as to form a continuous line of railway and telegraph "commencing at a point on the Central Pacific railroad and connecting therewith at or near the city of Sacramento and running thence by way of Stockton and the several routes mentioned in the several articles of association of the said 'The Western Pacific Railroad Company' and of the said 'San Francisco Bay Railroad Company' to a point on the 'San Francisco and San Jose railroad' and connecting therewith at or near the city of San Jose and to the several other points therein mentioned, to wit, the city of San Francisco, 'Yerba Buena Island,' otherwise called 'Goat Island,' and the point in the Bay of San Francisco between 'The Encinal' and the city of San Francisco; also to purchase, construct, own, maintain, and operate such branch and side lines and railroads between the said 'The Western Pacific railroad' and such several points on the Bay of San Francisco as the board of directors of said new and consolidated company may from time to time determine:

The length of the said railroad and telegraph lines being, as near as may be, two hundred and twenty-three miles."

And whereas by the laws of the State of California it is made lawful for any two or more railroad companies to amalgamate and consolidate their capital stock, debts, property, assets, and franchises, and they are authorized and empowered so to do in such manner as may be agreed upon by the boards of directors of such companies so desiring to amalgamate and consolidate their interests.

And whereas the boards of directors of the said railroad companies, parties of the first and second parts hereto, have agreed to amalgamate and consolidate the interests of said companies upon the terms, agreements, stipulations, and conditions hereinafter set forth.

And whereas more than three-fourths of the value of all the stockholders in interest of each of said companies, parties of
15 the first and second parts hereto, give and have given their written consent to such amalgamation and consolidation upon the terms, agreements, stipulations, and conditions hereafter set forth:

The said companies, parties of the first and second parts hereto, therefore hereby mutually covenant and agree to and with each other to the following articles, to wit:

Article first.

The said companies, parties hereto, agree to and do by these presents amalgamate and consolidate the capital stock, debts, property, assets, and franchises of each of said companies, the parties hereto of the first and second parts, into one company and corpora-

tion; and all the capital stock, debts, property, assets, and franchises in or to which said companies, the parties hereto, or either of them, have any right, title, interest, or claim, either in possession or expectancy, at law or in equity, or which may in any way relate or pertain to the said companies, parties hereto, or either of them, are amalgamated, united, merged, and consolidated into one company and corporation.

Article second.

The name of said new and consolidated company and corporation hereby formed under these articles shall be and is "Central Pacific Railroad Company." The said new company and corporation is to and shall continue in existence for the term and period of fifty years from the date of these articles.

Article third.

The objects and purposes of the said new consolidated company and corporation are: To purchase, construct, own, maintain, and operate the railroad and telegraph lines hereinbefore described of said parties of the first and second parts hereto, so as to form a continuous line of railway and telegraph from Ogden, in the Territory of Utah, to San Jose, in California, and to the waters of the Bay of San Francisco, to wit: Commencing at or near Ogden, in Utah, at the connecting point of the Central Pacific railroad and Union Pacific railroad, and running thence along the lines of the Cen-
16 tral Pacific railroad and the Western Pacific railroad by way of Sacramento and the several routes mentioned in the several articles of association of the said "The Central Pacific Railroad Company of California" and of the said "The Western Pacific Railroad Company" to a point on the San Francisco and San Jose railroad, and connecting therewith at or near the city of San Jose, California, and to the several other points heretofore herein mentioned, to wit, the city of San Francisco, "Yerba Buena Island"—otherwise called "Goat Island"—and the point in the Bay of San Francisco between "The Encinal" and the city of San Francisco; also to purchase, construct, own, maintain, and operate such branch and side lines and railroads between the said "The Western Pacific railroad" and such several points on the Bay of San Francisco and the navigable waters thereof as the board of directors of said new and consolidated company may from time to time determine, the length of the said railroad and telegraph lines being, as near as may be, one thousand (1,000) miles.

Article fourth.

The number of directors to manage the affairs of the said new and consolidated company and corporation shall be seven. The following-named persons shall act as such directors until others are duly elected, to wit: Leland Stanford, C. P. Huntington, Mark Hopkins, Charles Crocker, E. B. Crocker, E. H. Miller, Jr., and A. P. Stanford.

Article fifth.

The capital stock of the new and consolidated company and corporation is hereby fixed at one hundred million dollars, that being the actual and contemplated cost of constructing the said railroad and telegraph lines thus consolidated, including the cost of the right of way, motive power, and every other appurtenance and thing for the constructing, running, and operating of said railroad and telegraph lines as nearly as can be estimated by competent engineers. The said capital stock shall consist of and be divided into one million (1,000,000) shares of one hundred dollars each.

Article sixth.

The holders and owners of the capital stock of each of the said several corporations, parties of the first and second parts
17 hereto, shall be entitled to receive and hold an equal amount and number of the shares of the capital stock of the said new and consolidated company and corporation now held by them, respectively, and shall be entitled to receive from the new and consolidated company and corporation certificates therefor upon the surrender of the certificates of stock issued by said several parties of the first and second parts, or if their right to stock is otherwise evidenced, then upon surrender of such evidence that they are entitled to certificates from either of said parties.

Article seventh.

And the said several parties of the first and second parts, each for itself, hereby sells, assigns, transfers, grants, bargains, releases, and conveys to the said new and consolidated company and corporation, its successors and assigns, forever all its property, real, personal, and mixed, of every kind and description; all its capital stock, all its interest in the shares of its capital stock subscribed but not fully paid for; all credits, effects, judgments, decrees, contracts, agreements, claims, dues, and demands of every kind and description, and all rights, privileges, and franchises, corporate and otherwise, held, owned, or claimed by said parties of the first and second parts, or either of them, in possession or expectancy, either at law or in equity; subject, however, to all conditions, obligations, stipulations, contracts, agreements, liens, mortgages, incumbrances, claims, and charges thereon or in anywise affecting the same.

Article eighth.

The said new and consolidated company and corporation is to be liable for and shall fulfil, perform, do, and pay all and each of the contracts and agreements, covenants, duties, obligations, liabilities, debts, dues, and demands of the said several parties of the first and second parts, but this amalgamation and consolidation shall not in any way relieve the said parties of the first and second parts, or the stockholders thereof, from any and all just liabilities.

In testimony whereof the said parties of the first and second parts have severally caused these presents to be executed in duplicate and

each instrument to be signed by their respective presidents
18 and secretaries and the corporate seals of the said party of the first part and of the said party of the second part to be hereunto affixed, in pursuance of orders and resolutions of their several boards of directors made the twenty-second (22nd) day of June, A. D. 1870.

THE CENTRAL PACIFIC RAILROAD CO.
[STAMP.] OF CALIFORNIA,
(Corporate seal By LELAND STANFORD, *President*,
[STAMP.] C. P. R. R.) And E. H. MILLER, JR., *Secretary*.

THE WESTERN PACIFIC RAILROAD CO.,
[STAMP.] (Corporate seal By LELAND STANFORD, *President*,
W. P. R. R.) And E. H. MILLER, JR., *Secretary*.
[STAMP.]

(Four 10-cent Revenue Stamps Cancelled. T. F. E.)

We, the undersigned, being the holders of stock to the extent of more than three-fourths of the value of all stockholders in interest of the said "The Central Pacific Railroad Company of California," party of the first part to the foregoing new articles of association, amalgamating and consolidating the said parties of the first and second parts, hereby consent to such amalgamation and consolidation and to the said new articles of association this 22d day of June, A. D. 1870.

LELAND STANFORD.
CHARLES STANFORD,
By LELAND STANFORD,
His Attorney-in-Fact.
MARK HOPKINS.
C. P. HUNTINGTON,
By MARK HOPKINS,
Attorney-in-Fact.
C. CROCKER.
E. B. CROCKER,
By C. CROCKER,
Attorney-in-Fact.
E. H. MILLER, JR.,
C. L. SCUDDER,
A. P. STANFORD,
By LELAND STANFORD,
Attorney-in-Fact.
19 B. B. CROCKER.
D. O. MILLS & CO.
ALBERT GALLATIN.
W. R. S. FOYE.
C. H. CUMMINGS.
I. E. HOLLISTER.
JULIUS WETZLER.
J. L. FRIEND.
FRIEND & TERRY.
W. E. TERRY.

We, the undersigned, being the holders of stock to the extent of more than three-fourths of the value of all the stockholders in interest of the said "The Western Pacific Railroad Company," party of second part to the foregoing new articles of association, amalgamating and consolidating the said parties of the first and second parts, hereby consent to such amalgamation and consolidation and to the said new articles of association this 22d day of June, A. D. 1870:

LELAND STANFORD,
MARK HOPKINS,
C. P. HUNTINGTON,
By MARK HOPKINS,
Attorney-in-Fact.
C. CROCKER,
E. B. CROCKER,
By C. CROCKER,
Attorney-in-Fact.
E. H. MILLER, JR.,
A. P. STANFORD,
By LELAND STANFORD,
Attorney-in-Fact.
C. H. CUMMINGS.

Endorsed: Filed in office of the secretary of state June 23d, 1870. H. L. Nichols, secretary of state, by Lew B. Harris, deputy.

20 STATE OF CALIFORNIA, }
DEPARTMENT OF STATE. }

I, Thos. L. Thompson, secretary of state of the State of California, do hereby certify that I have carefully compared the annexed copy of the articles of consolidation of the "Central Pacific Railroad Company of California with the Western Pacific Railroad Company" with the original now on file in my office and that the same is a correct transcript therefrom and of the whole thereof; also that this authentication is in due form and by the proper officer.

Witness my hand and the great seal of State, at office, in Sacramento, California, the 30th day of July, A. D. 1885.

THOS. L. THOMPSON,
[SEAL.] *Secretary of State,*
By —— ——, *Deputy.*

STATE OF CALIFORNIA, } *ss:*
County of Sacramento, }

I, W. C. Van Fleet, a judge of the superior court of the State of California, held in and for the county of Sacramento, do hereby certify that the foregoing and attached copy of the articles of association of amalgamation and consolidation by and between the "Central Pacific Railroad Company of California" and the "Western Pacific Company" is duly certified by the secretary of state for the State of California, said secretary being the officer having the legal custody of the original.

Witness my hand and the seal of said court this first day of August, A. D. 1885.

W. C. VAN FLEET,
[SEAL.] *Judge Superior Court.*

The defendant objected to the said offer, that the said articles were irrelevant and immaterial, for the reason that there was no evidence showing that the corporations mentioned in said articles as amalgamating had ever been organized or to be in fact existing, or that the said document purporting to be articles of consolidation had any validity or was authorized under the laws of Utah Territory or any other competent authority; which objection was overruled by the court; to which ruling the defendant then and there excepted. The said articles were admitted in evidence and marked "Plaintiff's Exhibit 4."

21

The plaintiff next offered in evidence a paper purporting to be articles of association, amalgamation, and consolidation of the Central Pacific Railroad Company, the California and Oregon Railroad Company, the San Francisco, Oakland and Alameda Railroad Company, and the San Joaquin Valley Railroad Company, bearing date the twentieth day of August, A. D. 1870, in the words and figures following, to wit:

Articles of association, amalgamation, and consolidation made and executed on this twentieth day of August, A. D. 1870, by and between the Central Pacific Railroad Company, of the first part, and California and Oregon Railroad Company, of the second part, the San Francisco, Oakland and Alameda Railroad Company, of the third part, and the San Joaquin Valley Railroad Company, of the fourth part, all of said parties being railroad corporations duly incorporated, organized, and existing under and by virtue of the laws of the State of California, witnesseth:

That whereas the said party of the first part was duly incorporated and organized for the purpose of constructing, owning, maintaining, and operating a continuous line of railway and telegraph from Ogden, in the Territory of Utah, to San Jose, in California, and to the waters of the Bay of San Francisco, to wit: Commencing at or near Ogden, in Utah, at the point of junction with the Union Pacific railroad, running thence west to the eastern boundary of the State of Nevada, at the town of Toano; thence west across the State of Nevada to the eastern boundary of the State of California, at the Donner Pass, through the Sierra Nevada Mountains, passing through the towns of Elko, Carlin, Argenta, Winnemucca, Wadsworth, Reno, and intermediate points in the State of Nevada, to the town of Truckee, in the State of California; thence west, passing the towns of Cisco, Alta, Auburn, Roseville, Sacramento, Stockton, and intermediate points, to Niles Station, in Alameda county, in the State of California; thence to a point on the San Francisco and San Jose railroad and connecting therewith at or near the city of San Jose; also extending from said Niles Station to the city of Oakland, the city of San Francisco, Yerba Buena Island,

22

otherwise called Goat Island, and the point in the Bay of San Francisco between the Encinal and the city of San Francisco; also to purchase, construct, own, maintain, and operate such branch and side lines and railroads between the said railroad and such points on the Bay of San Francisco and the navigable waters thereof as the board of directors of said company may from time to time determine; the length of said railroad and telegraph being, as near as may be, one thousand (1,000) miles.

And whereas the said party of the second part was duly incorporated and organized for the purpose of purchasing, constructing, owning, maintaining, and operating a continuous line of railroad and telegraph commencing at Roseville, in the county of Placer, State of California, and there connecting with the railroad of the party of the first part hereinbefore described, running thence north through the towns of Marysville and Chico to the northern boundary of the State of California by such route and to such point on said boundary as may be selected by its board of directors, with such extension into the State of Oregon as said board may deem proper, under and by virtue of a certain act of Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific railroad, in California, to Portland, in Oregon, approved July 25th, 1866," and with the power or right to change the southern terminus to some other point on the said Central Pacific railroad between said town of Roseville and the bridge crossing the American river, near the city of Sacramento, whenever its board of directors may deem proper; the length of said railroad and telegraph in the State of California being, as near as may be, three hundred and thirteen miles.

And whereas the said party of the third part was duly incorporated and organized for the purpose of purchasing, constructing, owning, maintaining, and operating a continuous line of railway from the city and county of San Francisco through the city of Oakland and through a point, on the easterly part thereof, in Alameda county to a point on the line of the railroad formerly known as the San Francisco and Alameda railroad, at or near Fruit Vale Station,
23 in said county of Alameda, and also a continuous line or railroad from the extreme western point of the Encinal of San Antonio, in the county of Alameda, passing through said county of Alameda to a point on the Western Pacific railroad (now a part of the railroad of the said party of the first part), at or near Haywards, in said county of Alameda and State of California; also for the purpose of purchasing, constructing, owning, maintaining, and operating such branch and side lines and railroads between the said railroad and such several points on the Bay of San Francisco as its board of directors may from time to time determine, the length of said railroad being, as near as may be, twenty-five miles.

And whereas the said party of the fourth part was duly incorporated and organized for the purpose of purchasing, constructing, owning, maintaining, and operating a railroad from a point on the Western Pacific railroad (now a part of the railroad of the said party of the first part), at or near the city of Stockton, in the county of

San Joaquin, in the State of California, and between said city and the crossing of the San Joaquin river to a point on Kern river, in the county of Tulare, in said State, said point to be selected by its board of directors, said road passing into or through the counties of San Joaquin, Stanislaus, Merced, Fresno, and Tulare, the length being, as near as may be, three hundred miles.

And whereas said parties believe a consolidation and amalgamation of their capital stock, debts, properties, assets, roads, telegraphs, lands, and franchises will be mutually advantageous.

And whereas more than three-fourths in value of all the stockholders in interest of each of said parties have consented, in writing, to such amalgamation and consolidation, upon the terms and conditions hereinafter set forth:

Now, therefore, under and by virtue of the statute in such case made and provided, the said parties do hereby mutually covenant and agree, each with each and all the others, to the following articles, to wit:

Article I.

Said parties do hereby amalgamate and consolidate themselves into a new corporation under the name and style of the Central Pacific Railroad Company, which new corporation shall continue in existence for the period of fifty years from the date of these articles; and they do further consolidate and amalgamate their several capital stocks, debts, properties, assets, roads, telegraphs, lands, franchises, rights, titles, privileges, claims, and demands of every kind whatsoever, as well in possession as expectancy, at law or in equity, and do grant, convey, and vest the same in said new corporation as fully as the same are now severally held and enjoyed by them or either of them; subject, however, to all conditions, obligations, stipulations, contracts, agreements, liens, mortgages, incumbrances, claims, and charges thereon or in anywise affecting the same.

Article II.

The object and purpose of said new corporation shall be to purchase, construct, own, maintain, and operate all and each of the railroad and telegraph lines hereinbefore described, for the period hereinbefore stated.

Article III.

The board of directors of said new corporation shall consist of seven persons, and the following-named persons shall act as such directors until their successors shall have been duly elected, pursuant to the by-laws of said new corporation hereafter to be adopted, viz: Leland Stanford, William E. Brown, Mark Hopkins, Collis P. Huntington, Chas. Crocker, Edward H. Miller, Jr., and Chas. H. Cummings.

Article IV.

The capital stock of said new corporation shall be one hundred million dollars, consisting of one million shares of one hundred

dollars each, that sum being the contemplated actual cost of said railroad and telegraph lines, including rolling stock, motive power, depots, etc.

Article V.

Each stockholder of each of said parties shall have the same number of shares of the capital stock of the new corporation which he now owns and holds of the capital stock of his respective company, and shall be entitled to receive from said new corporation certificates therefor, upon the surrender of the certificates now held by him, or such other evidence of his ownership as he may now have, if no certificates have been issued to him by the company of which he is now a stockholder.

Article VI.

Said new corporation shall assume and perform all the contracts, agreements, covenants, duties, and obligations of what kind soever of each of the said parties, and shall pay and discharge all debts, claims, and demands existing against either and all of said parties, but nothing herein contained shall release the said parties or either of them or their stockholders or any of them from any of their just liabilities.

In testimony whereof said parties have severally caused these articles to be signed and executed by affixing thereto their respective corporate names and seals by their respective presidents and secretaries, pursuan tto the orders of their respective boards of directors, heretofore made on the day and year first above written.

CENTRAL PACIFIC RAILROAD COMPANY,
[C. P. R. R. Co.'s Seal.] By LELAND STANFORD, *President*,
And by E. H. MILLER, JR., *Secretary*.

CALIFORNIA AND OREGON RAILROAD COMPANY,
[C. & O. R. R. Co.'s Seal.] By LELAND STANFORD, *President*,
And by E. H. MILLER, JR., *Secretary*.

SAN FRANCISCO, OAKLAND & ALAMEDA RAILROAD COMPANY,
[S. F., O. & A. R. R. Co.'s Seal.] By ALFRED A. COHEN, *President*,
And by H. LACY, *Secretary*.

[50-cent Int. Rev. Stamp Cancelled.]

SAN JOAQUIN VALLEY RAILROAD COMPANY,
[S. J. V. R. R. Co.'s Seal.] By LELAND STANFORD, *President*,
And by E. H. MILLER, JR., *Secretary*.

The undersigned, being holders of more than three-fourths in value of the capital stock of the Central Pacific Railroad Company,

party of the first part in and to the foregoing articles, do hereby consent to the terms and conditions therein contained.

26 Done this the 16th day of August, A. D. 1870.

LELAND STANFORD.
MARK HOPKINS.
C. P. HUNTINGTON,
By MARK HOPKINS,
Attorney-in-Fact.
C. CROCKER.
E. B. CROCKER,
By C. CROCKER,
Attorney-in-Fact.
W. E. BROWN.
E. H. MILLER, JR.
C. H. CUMMINGS.

The undersigned, being holders of more than three-fourths in value of the capital stock of the California and Oregon Railroad Company, party of the second part in and to the foregoing articles, do hereby consent to the terms and conditions therein contained.

Done this the 16th day of August, A. D. 1870.

LELAND STANFORD.
MARK HOPKINS.
C. P. HUNTINGTON,
By MARK HOPKINS,
Attorney-in-Fact.
C. CROCKER.
E. B. CROCKER,
By C. CROCKER,
Attorney-in-Fact.
E. H. MILLER, JR.
B. B. REDDING.

The undersigned, being holders of more than three-fourths in value of the capital stock of the San Francisco, Oakland and Alameda Railroad Company, and party of the third part in and to the foregoing articles, do hereby consent to the terms and conditions therein contained.

Done this the 16th day of August, A. D. 1870.

ALF. A. COHEN.
D. O. MILLS.
F. D. ATHERTON.
D. P. BARSTOW.
W. C. RALSTON.

27 The undersigned, being holders of more than three-fourths in value of the capital stock of the San Joaquin Valley Railroad Company, party of the fourth part in and to the foregoing articles, do hereby consent to the terms and conditions therein contained.

Done this the 16th day of August, A. D. 1870.

LELAND STANFORD.
MARK HOPKINS.
C. P. HUNTINGTON,
By MARK HOPKINS,
Attorney-in-Fact.
C. CROCKER.
E. B. CROCKER,
By C. CROCKER,
Attorney-in-Fact.
E. H. MILLER, JR.
B. B. REDDING.
C. H. CUMMINGS.

(Endorsed.)

Articles of consolidation by and between the Central Pacific Railroad Company, the California and Oregon Railroad Company, the San Francisco, Oakland and Alameda Railroad Company, and the San Joaquin Valley Railroad Company.

Filed in the office of the secretary of state August 22d, 1870.

H. L. NICHOLS,
Secretary of State,
By LEW B. HARRIS, *Deputy.*

STATE OF CALIFORNIA, }
Department of State. }

I, Thos. L. Thompson, secretary of state of the State of California, do hereby certify that I have carefully compared the annexed copy of the articles of consolidation by and between the Central Pacific Railroad Company, the California and Oregon Railroad Company, the San Francisco, Oakland and Alameda Railroad Company, and the San Joaquin Valley Railroad Company with the original
28 now on file in my office, and that the same is a correct transcript therefrom and of the whole thereof; also that this authentication is in due form and by the proper officer.

Witness my hand and the great seal of State, at my office, in Sacramento, California, the 30th day of July, 1885.

THOS. L. THOMPSON,
[SEAL.] *Secretary of State.*

STATE OF CALIFORNIA, }
County of Sacramento, } *ss:*

I, W. C. Van Fleet, a judge of the superior court of the State of California, held in and for the county of Sacramento, do hereby certify that the foregoing and attached copy of the articles of association, amalgamation, and consolidation between the "Central Pacific Railroad Company," "California and Oregon Railroad Company," "San Francisco, Oakland and Alameda Railroad Company," and the San Joaquin Valley Railroad Company" is duly certified by the secretary of state for the State of California, said secretary being the officer having the legal custody of the original.

Witness my hand and seal of said court this 3d day of December, A. D. 1885.

W. C. VAN FLEET,
[SEAL.] *Judge of the Superior Court.*

To which offer the defendant objected upon the several grounds offered to the last preceding document offered in evidence by the plaintiff and marked "Exhibit 4;" but the court overruled said objections and admitted the said document in evidence, which was marked "Plaintiff's Exhibit 5;" to which ruling of the court the defendant then and there excepted.

D. P. Tarpey, the plaintiff, was sworn on his own behalf, and testified that he had demanded possession of the premises described in the complaint of the defendant prior to the commencement of this action, and that the same was refused; that he never had been in possession of the said lands or any portion thereof. The said D. P. Tarpey, M. K. Parsons, A. E. Barnes, John S. Houtz, A. Toponce, George Crocker, W. H. Bird, and Martin Cullen all testified
29 on behalf of the plaintiff that the said lands described in the complaint were in their nature desert or agricultural or grazing lands, and not mineral lands. Said A. E. Barnes testified that he went into possession of a portion of the said lands described in the complaint in the year 1875, and began the construction of improvements and erection of machinery for the purpose of raising the water of Great Salt Lake, on which said land bordered, into ponds or excavations, partly natural and partly constructed by him, for the purpose of evaporating the water so raised by exposure to the sun, and thus produce salt.

He further testified that by the said means he began the making of salt in the year 1876 or 1877, and continued to work at the said business and collected salt by the said means until September, A. D. 1883; that during that time he had expended several thousand dollars in the construction of buildings, machinery, and facilities for carrying on the said business in collecting salt as aforesaid and also for the manufacture of fine salt; that at the date last aforesaid, to wit, in September, A. D. 1883, he sold and transferred all of his said property and improvements upon said land and surrendered possession of the same to said defendant, The Deseret Salt Company; that the consideration for such sale and transfer was eight thousand five hundred dollars, and that the said property was reasonably worth that sum.

J. Fewson Smith, John Sparks, and George Y. Wallace were sworn on the part of the defendant, and severally testified that the said land was of no value whatever for agricultural purposes, and that it did not produce vegetation enough of any sort to make it of any value for grazing, and that the said land described in the complaint was so strongly impregnated with alkaline and saline matter as to render it wholly unfit for agriculture, and as to prevent the growth of vegetation thereon.

George Y. Wallace further testified that he was superintendent of the defendant, and had been since 1883, at the time of the pur-

chase of the said improvements by the said company from A. E. Barnes, as testified to by him; that the said company went into possession of the premises at the time of such purchase, and had continued in the possession ever since, and are still in the possession of said premises, and during that time have been engaged in making salt by pumping the water of Salt Lake into the said
30 evaporating ponds, and the salt was produced by the evaporation of the water by the sun's rays; that since said purchase the defendant had made other and additional improvements upon the said premises to be used, and used in connection with the making of salt as aforesaid, of the value of about a thousand dollars or upwards.

That the said J. Fewson Smith also testified that the said improvements were, in his judgment, worth not less than the sum of six thousand dollars, and that he was familiar with the cost of construction of improvements such as those situated upon the said premises, and of the machinery there used.

The above and foregoing was all the testimony introduced by the plaintiff in support of his alleged title to the demanded premises, and is the substance of the testimony given on behalf of the parties, respectively, as to the possession by the defendant and its predecessor in interest, the value of the improvements on said lands, and the use to which it has been devoted since 1875, at the time witness Barnes took possession of it.

After the close of the testimony in the case and after argument of the same to the jury by counsel for the plaintiff and defendant, respectively, the court, at the request of the said plaintiff, gave the jury the following instructions, to wit:

Prayers for Instructions by Plaintiff.

No. 1. The jury are instructed that by the act of Congress approved July, A. D. 1862, and the amendatory act thereof, approved July 2d, A. D. 1864, there was granted to the Central Pacific Railroad Co. of California, a corporation organized under the laws of the State of California, every alternate section of public land designated by odd numbers, to the amount of ten alternate sections per mile on each side of its railroad on the line thereof, from a point about four miles northwesterly from the station at Ogden, Utah, thence westerly to the line between the States of Nevada and California, and within the limits of twenty miles on each side of said road not sold, reserved, or otherwise disposed of by the United States, and to which
31 a pre-emption, homestead, swamp land, or other lawful claim had not attached at the time the line of said road was definitely fixed; that said grant excepted all mineral land or lands returned and denominated as such, the improvements of any *bona fide* settler, and all Government reservations.

That the line of said road became definitely fixed upon the filing by said corporation with the Department of the Interior its map of definite location, designating the general route of said road, and thereupon the beneficial interest equivalent to a fee simple vested in

the said corporation by relation back as of the date of said acts of Congress.

You are further instructed that it is established in this case by the stipulations of the parties that the lands in controversy here are the portions of an odd alternate section within the twenty-mile limit of the grant to the said corporation, and that said company filed its map of definite location as aforesaid in the Department of the Interior in October, 1868. You are instructed that unless at the time of the filing of said map the lands in controversy had been sold, reserved, or otherwise disposed of by the United States, or that some pre-emption, homestead, swamp land, or other lawful claim had attached thereto, or were known mineral lands, or were lands returned and denominated as such, or contained the improvements of any *bona fide* settler, they passed to and vested in the Central Pacific Railroad Company of California, and that said company became the owner thereof from the dates of said acts of Congress.

Given. JACOB S. BOREMAN, *Judge.*

Instruction 2.

You are further instructed that by the articles of association, amalgamation, and consolidation executed June 22nd, 1870, between the Central Pacific Railroad Company of California and the Western Pacific Railroad Company, and by the further articles of association, amalgamation, and consolidation executed August 20th, 1870, between the Central Pacific Railroad Company and certain other railroad companies, all the right, title, and interest in and to all the lands granted originally by the acts of Congress of July 1st, 1862, and July 2nd, 1864, passed to and vested in the Central Pacific Railroad Company; that thereupon the said company became the owner thereof.

32 That by the lease bearing date the seventh of August, 1885, introduced in evidence as Plaintiff's "Exhibit 2" and made by the Central Pacific Railroad Company to the plaintiff in this action, the said company leased and let for the term of five years from the first day of January, 1886, the lands mentioned in the complaint, and gave to him the right of the immediate possession of them, unless the same were within some one of the exceptions contained in the grants as heretofore stated.

Given. JACOB S. BOREMAN, *Judge.*

Instruction 3.

If you believe from the evidence that none of the lands described in the complaint at the date of the filing of the map of definite location, to wit, October, 1868, were not known as mineral lands and had not been returned and denominated as such and were not then reserved from sale, and that no pre-emption, swamp land, or other lawful claim had then attached thereto, the plaintiff is entitled to the possession thereof, and you will so find.

Given. JACOB S. BOREMAN, *Judge.*

Instruction 4.

If you believe from the evidence that the Central Pacific Railroad Company, the lessor of the plaintiff, did, on or about November, 1885, pay to the surveyor general and the register and receiver of the United States for this Territory, for the United States, the cost of surveying, selecting, and conveying a portion of the lands described in the complaint, to wit, the northwest quarter of northeast quarter and the northwest quarter of southwest quarter and the northwest quarter of section 9, of township eleven north, of range nine west, and that thereupon said lands were surveyed and returned as non-mineral, the character of said lands and all of them is conclusively determined for the purposes of this action, and the defendant herein cannot be permitted to question said determination.

Given. JACOB S. BOREMAN, *Judge.*

Instruction 5.

If you find that the plaintiff is entitled to recover you will award him as compensation for the withholding of the lands you so
33 find he is entitled to recover the reasonable value of the use and occupation thereof, from the date of the lease, August 7th, 1885, until the day of your verdict.

The defendant in such case is not entitled to offset in whole or in part the value of any improvements it or its predecessor Barnes may have placed upon the land. The value of the use and occupation aforesaid must be determined by you from the evidence in the cause.

Given. JACOB S. BOREMAN, *Judge.*

To the giving of which instructions so given by the court at the request of the plaintiffs and each of them and each and every part of each of said instructions the defendants then and there excepted.

At the request of the defendant the court gave the jury the following instructions, to wit:

Defendant's Request Granted.

1st. This is an action of ejectment brought by the plaintiff to recover the possession of the lands described in his complaint, and to entitle him to recover he must show a legal title, sufficient conveyance, or a prior possession in himself.

The plaintiff can only recover on the strength of his own title and not on the weakness of the defendants.

The failure of the defendant to show title cannot avail the plaintiff or strengthen his case.

Granted. J. S. BOREMAN, *Judge.*

The court also further instructed the jury as follows, viz:

If the jury find from the evidence that the lands described in the complaint are mineral lands and were known to be such at the time

the selection of the land was made by the railroad company in October, 1868, they are excepted from the grant of the United States to the railroad company, and the plaintiff in that case is not entitled to recover in this action.

Refusal as asked, but given as amended by the court.

J. S. BOREMAN, *Judge.*

34 If you find the plaintiff is entitled to recover the land described in the complaint or any portion thereof you are then to consider what sum, if any, the plaintiff is entitled under the evidence to recover as damages for withholding the same.

The measure of damages is the value of the rent or use and occupation of the land. In this case the evidence shows that the salt produced upon this land by the defendants and shipped away was produced by the evaporation of water of Salt Lake pumped upon the land by artificial means by the defendant. The value of this salt so gathered or the profit realized by the defendant thereon is not to be taken as the measure of damages, but the damages which the plaintiff may recover is such sum as you may find from the evidence to be rental value of the land, but in arriving at the rental value or the value of the use and occupation you have the right to take into consideration the purposes for which the property has been and is being used, the profits arising therefrom.

Refusal as asked, but given with the additions thereto made by the court.

J. S. BOREMAN, *Judge.*

All of the instructions I have given in this charge shall be taken together as a whole.

Salt is a mineral, but in order that you can find that the land or any part thereof is mineral land by reason of its containing salt you must believe from the evidence that such land contains some valuable deposit of salt, and that for that reason the land is valuable. The fact that the water of the Great Salt Lake can be or has been brought upon the land and that salt may or has been there manufactured out of said water is not proof that the land itself is mineral land as contemplated by the acts of Congress regarding public lands.

J. S. BOREMAN, *Judge.*

The above constitutes the whole of the charge of the court to the jury in said case.

The defendant also requested the court to charge the jury as follows:

2d. In this case the court charges you that the plaintiff has not shown any legal-paper title—that is, any grant or conveyance
35 by deed or other written instrument sufficient to invest him with the title to the land in question.

Refused. J. S. BOREMAN, *Judge.*

But the court refused to give the said instruction; to which refusal the defendant excepted.

Upon the court's refusing to give the instruction last aforesaid, numbered 2d, the defendant requested the court to give the following instructions, viz:

2d "A." In this case the plaintiff has not shown any legal-paper title—that is, any grant or conveyance by deed or other written instrument sufficient to invest him with the title to any of the land in question, except the northwest quarter of the northeast quarter, the northwest quarter, and the northwest quarter of the southwest quarter of said section 9, described in the complaint.

Refused. J. S. BOREMAN, *Judge.*

But the court refused to give the instruction so requested, as last aforesaid; to which refusal the defendant then and there excepted.

On the said 26th day of October, 1887, the jury returned a verdict in favor of the plaintiff for the lands described in the complaint and $500 for the use and occupation of the same, and on the said day judgment in due form was entered in accordance with the said verdict.

Assignment of Errors.

The defendant assigns the following errors and grounds for a new trial, to wit:

First.

Insufficiency of the evidence to justify the verdict in this, to wit:

a. The evidence fails to show there is any such corporation as the Central Pacific Railroad Company, claimed to be the plaintiff's lessor.

36 *b.* The evidence fails to show any transfer of the title of the "Central Pacific Railroad Company of California," a corporation, to the said lands (if it ever had any title thereto), to the plaintiff's lessor, the said Central Pacific Railroad Company.

c. The evidence fails to show that either the "Central Pacific Railroad Company of California" or the plaintiff's lessor, the Central Pacific Railroad Company, ever had title to the said lands.

d. The evidence fails to show title in fee in the plaintiff, as alleged in his complaint.

Second.

Error in law occurring at the trial and excepted to by the defendant as follows, viz:

a. The court erred in overruling the defendant's objection to the admission in evidence of the said lease, Exhibit 2, from the Central Pacific Railroad Company to the plaintiff, and in admitting the same in evidence.

b. The court erred in admitting in evidence, notwithstanding the defendant's objection, the said document purporting to be articles of amalgamation, etc., marked Exhibit 4.

c. The court erred in admitting in evidence, over the defendant's objection, the said document purporting to be articles of amalgamation, etc., and marked Exhibit 5.

d. The court erred in giving each of the instructions it did give, at the instance and request of the plaintiff, and numbered 1, 2, 3, and 4, as herein set forth.

e. The court erred in refusing to give the instruction herein set forth, requested by the defendant, and refused by it, and designated "2d."

f. The court, after having refused to give the said last-mentioned request, erred in refusing to give the instruction asked by defendant and designated "2d A," as herein set forth.

Dated January 9th, 1888.

P. L. WILLIAMS,
Attorney for Defendant.

It is hereby stipulated that the foregoing is a correct and
37 true statement and shall constitute the statement on motion for a new trial in this action and on appeal from final judgment.

C. S. VARIAN,
Attorney for Plaintiff.
P. L. WILLIAMS,
Attorney for Defendant.

The foregoing statement is hereby settled and allowed as correct.

JACOB S. BOREMAN, *Judge.*

January 10, 1888.

(Title of court and cause.)

The motion for new trial was submitted by consent of parties this 10th day of January, 1888, and, being now fully advised in the premises, it is ordered that the same be, and the same is, overruled.

JACOB S. BOREMAN, *Judge.*

January 10, 1888.

Endorsed: Statement on motion for new trial. Filed January 10, 1888. H. H. Henderson, clerk.

(Title of court and cause.)

Notice of Appeal.

To the said plaintiff and to C. S. Varian, Esq., his attorney:

Please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of said Territory from the judgment therein rendered and entered in the said district court on the twenty-sixth day of October, 1887, in favor of the said plaintiff and against the said defendant, and from the whole thereof, and
38 also from the judgment and order of said court made and entered on the tenth day of January, 1888, overruling and denying the said defendant's motion for a new trial in said action.

P. L. WILLIAMS,
Attorney for Defendant.

January 12th, 1887.

Endorsed: Title of court and cause. Notice of appeal. Received copy hereof January 12th, 1888. C. S. Varian, attorney for plaintiff. Filed January 12th, 1888.

TERRITORY OF UTAH, } ss:
Weber County, }

I, H. H. Henderson, clerk of the first judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original complaint, answer, verdict, judgment, notice of motion for a new trial, statement on motion for new trial, order refusing new trial, and notice of appeal in the above-entitled action filed in my office, excepting verifications to complaint and answer and repeating title of court and cause in the papers subsequent to complaint.

I further certify that an undertaking on appeal in due and proper form has been duly filed in my office.

Witness my signature and the seal of said court, at my office, in Ogden City, Utah, this — day of ——, 1888.

[L. S.] —— ——, *Clerk.*

The undersigned attorneys for the respective parties in the above-entitled cause do hereby certify and agree that the above and foregoing is a full, true, and correct transcript of the record and proceedings in said cause.

Jan'y 13th, 1888.

P. L. WILLIAMS,
Appellant's Att'y.
C. S. VARIAN,
Respondent's Att'y.

39 Supreme Court, Utah Territory.

FRIDAY, *January 13th, A. D.* 1888.

* * * * * * *

D. P. TARPEY, Respondent,
vs.
DESERET SALT COMPANY, Appellant. } From 1st. Dist.

On application of P. L. Williams, for appellant, ordered that this cause be put on the calendar of the present term and set for hearing on the 20th instant.

TUESDAY, *January 24th, A. D.* 1888.

* * * * * * *

D. P. TARPEY, Respondent,
vs.
DESERET SALT COMPANY, Appellant. } From 1st Dist.

This cause, coming on regularly for hearing, was argued by P. L. Williams, for appellant.

WEDNESDAY, *January 25th, A. D.* 1888.

* * * * * * *

D. P. TARPEY, Respondent,
vs.
DESERET SALT COMPANY, Appellant. } From 1st Dist.

This cause was further argued by P. L. Williams, for appellant, C. S. Varian, for respondent, submitted and taken under advisement.

SATURDAY, *February 18th, A. D.* 1888.

* * * * * * *

D. P. TARPEY, Respondent,
vs.
THE DESERET SALT COMPANY, Appellant. } From 1st Dist.

This cause having been heretofore argued and submitted and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court therein be, and the same is hereby, affirmed, and that respondent have and recover of and from appellant his costs herein.

On application of counsel of appellant, ordered that remittitur be, and is hereby, stayed for thirty days.

FRIDAY, *March 2d, A. D.* 1888.

* * * * * * *

D. P. TARPEY, Respondent,
vs.
THE DESERET SALT COMPANY, Appellant. } From 1st Dist.

On application of counsel of appellant that the amount of a supersedeas bond to be given on removal of this cause to the Supreme Court of the United States be now fixed, it is ordered that the amount of the penal sum of such supersedeas bond be, and hereby is, fixed at five thousand dollars.

Utah Territory Supreme Court.

D. P. TARPEY, Plaintiff and Appellee,
vs.
DESERET SALT COMPANY, Defendant and Appellant. }

HENDERSON, *J.*:

This is an action of ejectment for lands described in the complaint as "the northwest quarter of fractional section 9, in township 11 north, of range No. 9 west, Salt Lake base and meridian, and the N. E. quarter and the S. W. quarter of said section, in part covered with water, in all 380 acres, more or less." The lands border on Great Salt Lake, and at the time of commencing the action were in the possession of defendant and were used by it in its process of manufacturing salt by solar evaporation. The plaintiff proved his title to the lands by showing—

1. That the land is an odd-numbered section lying within the limits of the grant made by Congress to the "Central Pacific R. R. Co. of California" by the act of July 1st, 1862 (12 Stat., 489), and the various acts amendatory thereof.

43 2. That the lands were not such as were included in the reservations and exceptions contained in the act; that they were not mineral; had not been pre-empted or otherwise disposed of, etc.

3d. That the map of definite location of the line of said R. R. Co. was filed, as required by the act of Congress, on the 20th day of October, 1868.

4th. The amalgamation and consolidation of the said "Central Pacific R. R. Co. of California" and the "Western Pacific R. R. Co." by articles of association and incorporation bearing date June 22d, 1870, the new or consolidated company being the "Central Pacific R. R. Co."

5th. The amalgamation of the "Central Pacific R. R. Co.," the "California and Oregon Railroad Co.," the "San Francisco, Oakland and Alameda Railroad Co.," and the "San Joaquin Valley Railroad Co." by articles of association and incorporation dated August 20th, 1870. This consolidated company was also called the "Central Pacific R. R. Co."

6. A selection by the "Central Pacific R. R. Co." for patent of a portion of the lands, viz., the N. W. quarter of the N. E. quarter,

44 the N. W. quarter of the S. W. quarter, and the N. W. quarter of said section, and filed in the land office at Salt Lake City in 1885, they being the only lands in said section as to which the costs of surveying and conveying had been paid.

7. That the "Central Pacific R. R. Co." mortgaged the lands in controversy October 1, 1870.

8. A lease, dated August 7th, 1885, from the "Central Pacific R. R. Co." to the plaintiff, demising the lands to him for the term of five years from January 1, 1886.

The question presented by the record is whether this showing proves title *prima facie* in the plaintiff upon which he might recover, the claim made against it by the appellant being—

1. That the acts of Congress above referred to do not convey the legal title *in presenti* to the railroad company; that in view of the provisions of the act for subsequent patents and for payment of costs and expenses of survey and patent the grant is in the nature of a promise to grant in the future, and that until the subsequent grant is made by patent after payment of fees and expenses it is

45 but an equity and is not such a legal title as is required to be shown in ejectment.

2. That the lands were not conveyed by the "Central Pacific R. R. Co. of California" to the first amalgamated company, or by the first amalgamated company to the second; that the form and language of the articles of association put in evidence are insufficient for that purpose.

3. That no conveyances of the premises were proved from the "Central Pacific R. R. Co. of California" to the amalgamated com-

panies, and by the one to the other, and thence to the plaintiff, for the reason that the laws of the State of California were not shown or proved under which the amalgamated companies and the constituent companies composing them were organized, showing their legal right to organize or hold and convey property.

The record is made so as to present these questions, and we will notice them in the order above stated.

As to the first, the question as to whether the acts of Congress are to be construed as granting a legal title *in presenti*
46 has been much discussed by the courts. The question has been presented in various ways and forms under acts, so far as this question is concerned, precisely like the acts in question. In the following cases, Schulenberg *vs.* Harriman, 21 Wall., 44; R. R. Co. *vs.* U. S., 92 U. S., 733; R. R. Co. *vs.* R. R. Co., 97 U. S., 491; R. R. Co. *vs.* Baldwin, 103 U. S., 426; Grinnell *vs.* R. R. Co., 103 U. S., 739; Wright *vs.* Roseberry, 121 U. S., 488; Rutherford *vs.* Greene's Heirs, 2 Wheat., 196, the Supreme Court of the United States have held that the title granted was a perfect legal title *in presenti* as distinguished from an equitable or inchoate interest arising upon a contract or promise of the Government. The appellant relies upon Railway Co. *vs.* Prescott, 16 Wall., 603; Railway Co. *vs.* McShane, 22 Wall., 444; Northern Pacific R. R. Co. *vs.* Traill Co., 115 U. S., 600. The latter case is in seeming conflict with the cases first cited. In an opinion recently rendered by Judge Field, sitting in the district court (Denny *vs.* Dodson, 32 Fed. Rep., 899), in holding that the grant under an act like the one in question granted
47 the legal title *in presenti*, and having his attention called to North. Pac. R. R. Co. *vs.* Traill Co., *supra*, and its apparent conflict with the cases first cited, — reasons that the conflict is only seeming and not real, by showing that the question in the latter case presented for judgment was different, and only presented a question between the Government and its grantee. We deem it unnecessary to cite the statute at length or enter into any extended review of the subject. In the cases cited the whole subject is fully and elaborately discussed. The language of that act is "that there be, and hereby is, granted." We think it is now beyond controversy that when the question is presented, as it is here, where no right of the Government reserved in the act making the grant is involved, it grants the legal title *in presenti* to all the lands included in the grant, whether surveyed and selected or not.

The second point involves the construction of the language
48 of the articles of amalgamation and incorporation. Do they contain apt and necessary words for the conveyance of the property in question? In each of the articles, in the first, in article 7, and in the second, in article 1, is found substantially the following provisions:

"And the said several parties, each for itself, hereby sells, assigns, transfers, grants, bargains, releases, and conveys to the said new and consolidated company and corporation, its successors and assigns, forever, all its property, real, personal and mixed, of every kind and description; all its capital stock; all its interest in the shares

of its capital stock subscribed but not fully paid for; all credits, effects, judgments, decrees, contracts, agreements, claims, dues, and demands of every kind and description; and all rights, privileges, and franchises, corporate and otherwise, held, owned, or claimed by said parties of the first and second parts or either of them, in possession or expectancy, either at law or in equity; subject, however, to all conditions, obligations, stipulations, contracts, agreements,
49 liens, mortgages, incumbrances, claims, and charges thereon or in anywise affecting the same."

We cannot conceive of language more apt to effectuate the transfer, and we think it sufficient in form for that purpose. The claim that the property was not conveyed because it was not shown to be property required for the purposes for which the corporation was organized is, we think, as will presently be seen, immaterial; but, if it was, the acts granting the land declared the purposes for which it was granted and provided the uses to which it should be put, which are declared to be the corporate purposes and objects of the grantee. Burke *vs.* Smith, 16 Wall., 395.

There was no proof of the laws of the State of California under which the various corporations claim to be organized, and this gives rise to the third and last question. It will be observed that the plaintiff traces his title by mesne conveyances through the corporations. They are not parties to the record. Their existence
50 and powers are not directly in issue, and the defendant is in no way in privity with them. Under the circumstances, the only proof of corporate existence that is required is proof of the corporation *de facto*, and this was abundently proved by the articles of incorporation. They were under the seals of the companies, respectively, and were duly signed, acknowledged, and proved. 2 Morrowwitz on Corp., 746, 750, 776–'7–'8.

But it is said that there was no proof of the corporate existence *de facto* as to some of the constituent companies that entered into and in part formed the amalgamated companies. We are not prepared to say that the execution of the articles by them under their seals is not *prima facie* evidence of their existence *de facto*, but the fallacy of this claim will be seen by tracing this title in detail. The Government conveyed this land to the "Central Pacific Railroad Company of California." This conclusively proves the incorporation of this company not only *de facto*, but *de jure*. The grant of real estate by the Government to an association of individuals by any name denoting it as other than a natural person thereby clothes
51 it with corporate capacity to take, hold, and convey the same. Bingham on R. E., 854.

This company amalgamated with the "Western Pacific Railroad Co." and together they formed the "Central Pacific Railroad Company," and the title was passed to the new company. Suppose, according to the contention of the appellant, that there is no proof of the existence of "The Western Pacific Railroad Co.," and that it is to be presumed that it did not exist, then the new company would be but a reincorporation of the "Central Pacific Railroad Company of California" and would be its successor with the title of the property

transferred to it. The new incorporation thus formed again joined with various other companies in forming still another company. If it is to be presumed that the companies joining with it did not exist, then it is again but another reincorporation with the title again transferred to the new company, and this company conveyed to the plaintiff. In other words, all the companies through which this title passed were shown to exist *de facto* by articles of incorporation. The existence of these companies, their amalgamation and consoli-
52 dation, is specially recognized by the act of Congress of May 7th, 1878 (20 Stat., 56), and thereby also their existence is established *de facto*; but it is said that without proof of the laws of California there was no proof that the corporations were authorized by law to hold real estate at all or to transfer it, or that it was within the purposes and objects for which they were incorporated. This it is not necessary to show. Transfers of property to and transfers by corporations that have no such right or authority by law are not void; they are only voidable at the instance of the Government in a direct proceeding for that purpose. 2 Morrowitz on Corp., 648 to 653, inc., 709–'10–'11, 746; Devlin on Deeds, sec. 121; Telegraph Co. *vs.* Telegraph Co., 22 Cal., 398; Natoma Water Co. *vs.* Clarkin, 14 Cal., 544; Bank *vs.* Matthews, 98 U. S., 628; Leazure *vs.* Hillegar, 7 Serg. & R. (Pa.), 313; Banks *vs.* Poitiaux, 15 Am. Dec., 706; Oil Co. *vs.* R. R. Co., 32 Fed. Rep., 22.

As to whether transfers to and by corporations that are expressly prohibited therefrom by positive legislative enactments are absolutely void as between third parties, the authorities differ,
53 but the burden of showing that there is such prohibition is upon the party attacking the transfer. Burrill *vs.* Nahant Bank, 35 Am. Dec., 395.

The question of authority on the part of the corporation was purely a collateral one in this case. The defendant was in no situation to attack their passed and fully-executed contracts at least without showing that they were wholly and absolutely void. (Devlin on Deeds; Natoma Water Co. *vs.* Clarkin; Banks *vs.* Poitiaux, *supra.*) The rules are the same as to foreign corporations. The power and the right of a foreign corporation to hold and convey property is not to be determined under the laws of the home Government under which they are organized, but it is to be determined by the laws of the government in which they are doing business and in which they acquire the property. Runyon *vs.* Coster's Lessees, 14 Pet., 121; Silver Lake Bank *vs.* North John's Ch., 370; Lumbard *vs.* Aldrich, 28 Am. Dec., 381.

This must be true as the result of the rule that it is a question only between the corporation and the Government.
54 If lands acquired by a foreign corporation are liable thereby to be forfeited to the government under which it is organized a foreign government might in this indirect way acquire lands within the domain and jurisdiction of other governments, which might not be permitted. By the general comity which exists throughout the United States and Territories, in the absence of positive prohibitions, corporations created in one State or Territory

are permitted to carry on any lawful business in any other State or Territory, and to acquire, hold, and transfer property there equally as individuals. If the policy of a State or Territory does not permit the business of a foreign corporation in its limits or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way by the State or Territory where the property is acquired. Cowell *vs.* Springs Co., 100 U. S., 55.

The deeds or transfers of these corporations under their seals, properly affixed, and duly executed and proved, produced by the party claiming under them, is sufficient *prima facie* proof of title. Burrill *vs.* Nahant Bank, *supra.*

55 In Natoma Water Co. *vs.* Clarkin, *supra*, the supreme court of California say: "It would lead to indefinite inconveniences and embarrassments if in suits by corporations to recover the possession of their property inquiries were permitted as to the necessity of such property for the purposes of their incorporation, and the title made to rest upon the existence of that necessity." In that case the corporation was a party. Here, where the transaction is fully passed and executed, the reasoning applies with greater force. If the title to every piece of land which happened to be traced to and from a corporation was made to depend upon whether the corporation was duly and legally organized strictly according to the laws of the government under which it claims existence, and as to whether the taking, holding, and conveying of the property was strictly within their corporate powers and for their corporate purposes, it would tend to lessen the value of corporate franchises and to impair the marketable value of lands thus situated by reason of the difficulties in determining the title.

56 Our attention is not directed to any error in the record, and the judgment should be affirmed.

Zane, C. J., concurs.
Boreman, Justice, concurs.

Filed 18th Febr'y, 1888.

E. T. SPRAGUE, *Clerk.*

C. S. Varian, for plaintiff & appellee.
P. L. Williams, for defendant & appellant.

57 United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1888, pursuant to a writ of error filed in the clerk's office of the supreme court of Utah Territory, wherein The Deseret Salt Company, a corporation, is plaintiff in error and you, D. P. Tarpey, are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to each of the parties in that behalf.

Witness the Honorable Charles S. Zane, chief justice of the supreme court of Utah Territory, this 10th day of March, A. D. 1888.

C. S. ZANE,
Chief Justice of the Supreme Court of Utah Territory.

A copy of the foregoing citation was served on me this 10th day of March, A. D. 1888.

C. S. VARIAN,
Attorney for D. P. Tarpey, Def't in Error.

[Endorsed:] Original. Deseret Salt Company, pl'ff in error, *vs.* D. P. Tarpey, def't in error. Citation. Filed March 10, 1888. E. T. Sprague, clerk.

58 *Assignment of Errors and Prayer for Reversal.*

In the Supreme Court of the United States.

THE DESERET SALT COMPANY, a Corporation, Plaintiff in Error,
vs.
D. P. TARPEY, Defendant in Error.

The said plaintiff in error assigns as error—

First.

That the evidence in said cause was insufficient to justify the verdict given in said district court in favor of the said defendant in error in this, to wit, the evidence fails to show that there is any such corporation as the Central Pacific Railroad Company, claimed to be the lessor of the said defendant in error. The evidence also fails to show any transfer of the title of the "Central Pacific Railroad Company of California," a corporation, to the said lands (if it ever had any title thereto) to the lessor of the said defendant in error, the said Central Pacific Railroad Company. The said evidence also fails to show that either the "Central Pacific Railroad Company of California" or the Central Pacific Railroad Company, the lessor of the said defendant in error, ever had title to the said lands. The said evidence also fails to show title in fee in the defendant
59 in error as alleged in his complaint, and the said supreme court erred in holding the contrary thereof and in affirming the said verdict and judgment of the said supreme court notwithstanding the said insufficiency of evidence.

Second.

The said supreme court erred in sustaining the action of the said district court in overruling the objection of the plaintiff in error (the defendant in said district court) to the admission in evidence of the lease, Exhibit "2," from the Central Pacific Railroad Company to the defendant in error (the plaintiff in said district court) and in admitting the same in evidence.

Third.

The said supreme court erred in sustaining the action of the said district court in admitting in evidence, notwithstanding the objection of the plaintiff in error (the defendant in said district court), the said document purporting to be articles of amalgamation, etc., marked Exhibit "4."

Fourth.

The said supreme court erred in sustaining the action of said district court in admitting in evidence over the objection of the plaintiff in error (the defendant in said district court) the said document purporting to be articles of amalgamation, etc., and marked Exhibit "5."

Fifth.

60 The said supreme court erred in sustaining the action of said district court in giving each of the instructions it did give at the instance and request of the defendant in error (the plaintiff in said district court) and numbered one, two, three, and four, as set forth in the above record.

Sixth.

The said supreme court erred in sustaining the action of said district court in refusing to give the instructions set forth in the above record by the plaintiff in error (the defendant in said district court) and refused by it, and designated "2nd."

Seventh.

The said supreme court erred in sustaining the action of said district court, after having refused to give the said last-mentioned instruction asked by the plaintiff in error (the defendant in said district court), in refusing to give the instruction asked by plaintiff in error, and designated "2nd A," as set forth herein.

Wherefore, in consideration of said errors, the plaintiff in error prays this court for a judgment of reversal of said judgment and decision of the said supreme court of Utah Territory, and that said cause be remanded, with the direction that such further action and proceedings be taken therein as may be in accordance with law.

P. L. WILLIAMS,
Attorney for Plaintiff in Error.

[Endorsed]: Copy. Deseret Salt Company, pl'ff in error, *vs.* D. P. Tarpey, def't in error. Assignment of errors. Filed March 10, 1888. E. T. Sprague, clerk.

61 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before

you, between D. P. Tarpey, plaintiff and respondent, and The Deseret Salt Company, defendant and appellant, manifest error hath happened, to the great damage of the said Deseret Salt Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1888, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, and the seal of the supreme court of the Ter-
62 ritory of Utah, this tenth day of March, in the year of our Lord one thousand eight hundred and eighty-eight.

[Seal Supreme Court of Utah, United States of America.]

E. T. SPRAGUE,
Clerk of the Supreme Court of Utah Territory.

[Endorsed:] Original. Deseret Salt Company, pl'ff in error, *vs.* D. P. Tarpey, def't in error Writ of error.

63 Know all men by these presents that we, George Y. Wallace and John Sharp, both of the city and county of Salt Lake, Territory of Utah, are held and firmly bound unto D. P. Tarpey in the full and just sum of five thousand dollars ($5,000) to be paid to the said D. P. Tarpey and to his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this tenth day of March, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at a term of the supreme court of the Territory of Utah, in an action pending in said court on appeal from the district court for the first judicial district of said Territory, a judgment in favor of the said D. P. Tarpey, the plaintiff therein, and against The Deseret Salt Company, a corporation, the defendant, rendered and entered in said district court, was affirmed by said supreme court; and the said Deseret Salt Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court
64 to reverse the said judgment, and a citation to the said D. P. Tarpey, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October, A. D. 1888: Now, the condition of the above obligation is such that if the said Deseret Salt Company shall prosecute its said writ of error to effect and answer

all damages and costs in full if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

GEO. Y. WALLACE. [SEAL.]
JOHN SHARP. [SEAL.]

Signed, sealed, and delivered in the presence of—
P. L. WILLIAMS.

All erasures and interlineations in the above bond were made before it was signed.
Attest: P. L. WILLIAMS.

The above bond approved by me this 10th day of March, A. D. 1888.

C. S. ZANE,
Chief Justice of the Supreme Court of Utah Territory.

Filed March 10, 1888.

E. T. SPRAGUE, *Clerk.*

65 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

I, E. T. Sprague, clerk of the supreme court of said Territory of Utah, in pursuance of the attached writ of error, do return, annexed hereto and to said writ, the original citation, a transcript of the record, the proceedings, opinion, assignment of errors, supersedeas bond, all in and of said court in the cause in said writ described, to the Supreme Court of the United States; and I hereby certify that said annexed transcript of said record, proceedings, opinion, assignment of errors, and bond is a full, true, correct, and complete copy of the several originals thereof on file or of record in my office.

In witness whereof I hereunto set my hand and the seal of said supreme court of Utah Territory this 9th day of April, A. D. 1888, at Salt Lake City.

{ Seal Supreme Court Territory of Utah, United States of America. }

E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

Endorsed on cover: Utah Territory supreme court. No. 736. The Deseret Salt Company, plaintiff in error, *vs.* D. P. Tarpey. Filed September 10, 1888.

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NOV 9 1891
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CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 96.

DESERET SALT COMPANY,
Plaintiff in Error.
vs.
D. P. TARPEY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT
OF UTAH TERRITORY.

BRIEF OF PLAINTIFF IN ERROR.

PARLEY L. WILLIAMS,
Attorney for Plaintiff in Error.

Star Print, 48 W. Second South St.

In the Supreme Court of the United States.

DESERET SALT COMPANY,
Plaintiff in Error.
vs.
D. P. TARPEY,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an action of ejectment brought originally in the First District Court of Utah Territory.

The complaint in the usual form alleges fee title in the plaintiff of the lands described, right to possession and ouster by the defendant, with demand of the recovery of the possession.

The answer puts in issue the material allegations of the complaint.

There was a verdict and judgment for the plaintiff (the defendant in error here) and an appeal taken by the defendant (the plaintiff in error here) to the Supreme Court of the Territory of Utah, where the judgment was affirmed the court sustaining the action of the district court in its several rulings, which action of said Supreme Court is now complained of as error.

The defendant derived his title:

First—Under the Act of Congress granting the lands to the Central Pacific Railroad Company of California.

Second—A paper set forth in the record purporting to be articles of consolidation of the "Central Pacific Railroad Company of California" and the "Western Pacific Railroad Company" bearing date the 22d day of June, A. D. 1870.

Third.—A paper contained in the record purporting to be articles of consolidation of the "Central Pacific Railroad Company," the "California & Oregon Railroad Company," the "San Francisco, Oakland & Alameda Railroad Company" and the "San Joaquin Valley Railroad Company," bearing date the 20th day of August, 1870.

Fourth.—A lease from this latter consolidated company to the plaintiff, bearing date September 22d, 1885, which also appears in the record.

Fifth—List No. 6, being lands selected for patent by the Central Pacific Railroad Company and filed in the Land Office at Salt Lake City, which selection included only the surveyed lands contained in section nine.

The lands so surveyed in said section were the northwest quarter of the northeast quarter; the northwest

quarter of the southwest quarter, and the northwest quarter of said section only.

There was testimony also introduced from the Surveyor General's office of the Territory of Utah, to the effect that the Field Notes and Official Plat of said fractional section showed that only so much thereof had been surveyed for patent as was contained in said selection list No, 6.

This constituted the whole of the testimony introduced by the defendant in error to support his alleged title to the demanded premises. There was also proof that the land in question was situated within the limits of the grant to the Central Pacific Railroad Company of California.

The said list showed that the cost of surveying, selecting and conveying the lands so selected and above described, had been paid, but there was no evidence that any application had been made by the Central Pacific Railroad Company to select or have conveyed to it any other of the lands in said fractional section nine, nor that it had paid or tendered the costs of surveying, selecting or conveying any other of the lands within said fractional section.

ASSIGNMENT OF ERRORS.

The said Supreme Court of Utah Territory erred in sustaining the action of said district court in holding:

1.—That there was any evidence showing the existence of such a corporation as the Central Pacific Railroad Company.

There was a verdict and judgment for the plaintiff (the defendant in error here) and an appeal taken by the defendant (the plaintiff in error here) to the Supreme Court of the Territory of Utah, where the judgment was affirmed, the court sustaining the action of the district court in its several rulings, which action of said Supreme Court is now complained of as error.

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ASSIGNMENT OF ERRORS.

The said Supreme Court of Utah Territory erred in sustaining the action of said district court in holding:

1.—That there was any evidence showing the existence of such a corporation as the Central Pacific Railroad Company.

2.—In holding that the evidence introduced showed a transfer of the title of the Central Pacific Railroad Company of California of the lands in controversy to the plaintiff's lessor ,the Central Pacific Railroad Company.

3.—In holding that the evidence established that the Central Pacific Railroad Company of California or the plaintiff's lessor the Central Pacific Railroad Company ever had title to the said land.

4.—In holding that the plaintiff was entitled to recover in the said case.

5.—In overruling the objection of the plaintiff in error to the admission in evidence of the said lease from the Central Pacific Railroad Company to the defendant in error, and admitting the same in evidence.

6.—In admitting in evidence over the objection of the plaintiff in error, each of the said papers purporting to be articles of amalgamation and consolidation.

7.—In giving each of the instructions which it did give at the instance and request of the defendant in error and numbered 1, 2, 3 and 4 as set forth in the record.

8.—In refusing to give the instructions set forth requested by the plaintiff in error and refused by the court, designated "Second."

The plaintiff in error now insists that the action of the said district court in admitting the said several documents on which the plaintiff's title was rested, was error and that error was perpetuated by the Supreme Court in affirming the several rulings of the said district court upon that subject.

The objections to the admission of these documents, are.

1.—That there was no proof of the incorporation or previous existence of any of the assumed corporations purporting to be consolidated, except only the Central Pacific Railroad Company of California.

2.—There was at the date of the assumed consolidations no law of Utah Territory authorizing the same.

3.—No law of the State of California or other State or Territory authorizing such consolidations was shown to exist.

4.—There was no evidence that their execution was genuine.

5.—They were insufficient for the purpose of conveying the land in question from the Central Pacific Railroad Company of California, the grantee under the Act of Congress, to the lessor of the defendant in error.

The purport and object of these articles of consolidation, if valid, was to consolidate the capital stock, debts, property, assets and franchises of the companies, parties thereto, that is, such property as appertained to them as railroad companies and was covered by their franchises. These lands granted by the government were held by the railroad company, not for railroad purposes but in the same manner that private parties or other corporations hold real estate and were subject to conveyance so far as situated in the Territory of Utah, in accordance with the laws of the Territory then in force.

The law of Utah Territory at that time in force with

reference to the conveyance of lands is found in the compilation of the laws of Utah, 1851-1870, approved January 18, 1855, and is in the following language.

"SEC. 1. Be it enacted by the Governor and Legislative Assembly of the Territory of Utah: That the transfer of a land claim with the improvements thereon must be substantially in form as follows:

Be it known by these presents that.....of..... the rightful claimant and owner of (here describe the property and its location, and, if required, any peculiar rights and appurtenances) do for the sum of .....dollars paid by.....of : or in consideration of . good will to.... (as the case may be) transfer all my claim to and ownership of the aforesaid property to the said ....heirs and assigns. Dated this.....day of..... in the year....

SEC. 2. To be valid, a transfer must be witnessed by two or more competent persons, be acknowledged before some person authorized to take acknowledgments; be recorded; and the record, page and book be certified thereon by the recorder in the county where the property is located.

SEC. 3. Other property than land claims and the improvements thereon, when disposed of by gift must be transferred substantially in the same manner, and by specification of kind and number or amount, but, unless, required, the details may be omitted.

"SEC. 4. Any person or body corporate, legally authorized to purchase and dispose of property may trans-

fer to any other person or body corporate all rightful claim and ownership of property by gift, and such transfer is and shall be deemed valid and a bar to all claims whatever, except just liabilities incurred previous to the time of transfer."

This act and its effects has been under review by this court in the case of Neslin against Wells, 104 U. S., 428.

There was no evidence whatever showing or tending to show that the government had issued patents for any of the lands in question, nor was there any proof that the company had made any application to select or have conveyed to it any lands in said fractional section except the northwest quarter, the northwest quarter of the northeast quarter, and the northwest quarter of the southwest quarter; being two hundred and forty acres only, and the whole of the land in said fractional section which had been surveyed; yet the recovery in this case was for the whole tract sued for, the unsurveyed as well as the surveyed portions of this fractional section.

As to so much of this land as was unsurveyed and for which the costs of surveying have not been paid, it is submitted with great confidence that by the true construction of the Act of Congress granting these lands, the title remains in the government and the defendant in error has not therefore, under any view of the case, a title that will support ejectment. In this connection the court is cited to the following cases in this court.

Railway Company vs. Prescott, 16 Wallace, 603.
Railway Company vs. McShane, 22 Wallace, 444.

Supreme Court U. S.
FILED,
OCT 14 1889
JAMES H. McKENNEY,
CLERK.

BRIEF OF PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 736.

THE DESERET SALT COMPANY, PLAINTIFF IN ERROR.

vs.

D. P. TARPEY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE DESERET SALT COMPANY, PLAINTIFF IN ERROR

vs.

D. P. TARPEY, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS AND AFFIRM.

MOTION TO DISMISS.

This is an action in ejectment; the plaintiff, by his complaint, in the ordinary form alleging a fee title in himself of the lands described, right to possession, ouster by the defendant, and then demands a recovery of the possession. The whole matter of the complaint is put in issue by the answer. (Record, pages 1 and 2.) It follows the matter in dispute is primarily the land itself and appurtenances; and incidentally the rents, damages for withholding, etc.

The only evidence offered by the defendant in error to support his averment of *seisin in fee* was a lease for five years, to himself, from the Central Pacific Railroad Company, and the admission of

this evidence, notwithstanding the objection of the plaintiff in error, is now complained of in this Court.

It is therefore earnestly insisted by the plaintiff in error, that there is no support in this record for the claim made by the defendant in error that "the matter in dispute is the leasehold estate," * * which "will terminate August, A. D. 1890."

The matter in dispute being the land itself and appurtenances, the record shows clearly the case is within the jurisdiction of this Court. It is, and has been for years, used for producing salt by solar evaporation of water pumped from Great Salt Lake into ponds upon said land. These ponds were in part natural and partly constructed by the grantor of the plaintiff in error. Buildings, machinery, etc., to be used in said business, were erected and placed on said land.

The whole was sold to the plaintiff in error in September, 1883, for the sum of $8,500; afterward and before the trial, other improvements for the same general purpose were placed upon the premises of the value of about $1,000; and at the time of the trial, the improvements, consisting of buildings, excavated ponds, machinery, etc., used thereon for producing salt, were worth not less than $6,000. (Record, pages 22 and 23.

In addition to the facts shown by the record, the plaintiff herewith presents the affidavit of George Y. Wallace as to the value of the premises in controversy, and asks that it be considered by the Court.

MOTION TO AFFIRM.

The motion to affirm ought not to be allowed. The defendant in error derives his title by lease only from the "Central Pacific Railroad Company," the existence of which as a corporation was not proved otherwise than by the production of certain papers set forth in the record purporting to be articles of consolidation of certain pre-existing corporations. The admission of these, without proof of their execution or authority therefor, was objected to by the plaintiff in error, but overruled, and this action of the Court is now assigned as error. Briefly stated, the objections to the admission of these documents are:

First—That there was no proof of the incorporation or previous existence of any of the assumed corporations purporting to be

consolidated, except as to the "Central Pacific Railroad Company of California"

Second—There was, at the date of the assumed consolidations, no law of Utah Territory authorizing the same.

Third—No foreign law authorizing such consolidations was shown to exist.

Fourth—There was no evidence that their execution was genuine, and

Fifth—They were insufficient for the purpose of conveying the lands in question from the "Central Pacific Railroad Company of California," the grantee under the Acts of Congress, to the lessor of the defendant in error.

Further, it was not shown that the government had ever issued patents for the lands in question; nor was there any proof that the company had made any application to select or have conveyed to it any lands in said section except the N. W. ¼, the N. W. ¼ of the N. E ¼ and the N. W. ¼ of the S. W. ¼, being 240 acres only, and the whole of the land in said section surveyed, as shown by the diagram, page 10½ of the record, yet the recovery was of the whole tract sued for, the unsurveyed as well as the surveyed portions of this section.

As to so much of this land as is unsurveyed, and for which the costs for surveying have not been paid, the title remains in the government, it is not subject to taxation; and the defendant in error, has not therefore, under any view of the case, a title that will support ejectment.

Railway Company vs. Prescott, 16 Wall, 603.
Railway Company vs. McShane, 22 Wall, 444.
North. Pacific R. R. Co. vs. Traill County, 115 U. S., 600.

This record presents a question regarding the nature of the rights secured to the Pacific Railroads by virtue of the grant of lands to them that has never been passed on by this Court, a question which involves the rights of the parties here; and is also one of great moment to a large part of the public in the region affected by these grants.

P. L. WILLIAMS,
Attorney for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
SEP 2 1889
JAMES. H. McKENNEY.
CLERK

BRIEF OF PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 736.

THE DESERET SALT COMPANY, PLAINTIFF IN ERROR,

vs.

D. P. TARPEY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE DESERET SALT COMPANY, PLAINTIFF IN ERROR,

vs.

D. P. TARPEY, DEFENDANT IN ERROR.

Take notice that on the second Monday in October, 1889, being the first day of the October Term of the Court, the defendant in error above named, will by his counsel, submit for the consideration of the court, his motion to dismiss the writ of error herein, united with a motion to affirm, hereto annexed and served herewith.

Said motion will be made upon the record, motion papers and printed brief served herewith.

Very respectfully,

CHAS. S. VARIAN,

Attorney for defendant in error.

To Parley L. Williams, Esq., counsel for plaintiff in error, and to the Clerk of the Supreme Court of the United States.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE DESERET SALT COMPANY, PLAINTIFF IN ERROR,

vs.

D. P. TARPEY, DEFENDANT IN ERROR.

Now comes the defendant in error above named, by his counsel, and moves the court that the writ of error herein be dismissed, on the ground that it does not appear from the record herein, that this court has jurisdiction in the premises, in this: That it does not appear that the value of the matter in dispute does [redacted] exceed $5,000.

And the said defendant in error, by his counsel, under Paragraph 5, Rule 6 of this Court, moves to affirm the judgment of the Supreme Court of the Territory of Utah in this cause, on the ground that it is manifest that the writ of error herein, was taken for delay only.

CHAS. S. VARIAN,

Attorney for defendant in error.

Service with copy of motion, notice and brief with same admitted this 26th day of August, A. D. 1889.

PARLEY L. WILLIAMS,

Attorney for plaintiff in error.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE DESERET SALT COMPANY, PLAINTIFF IN ERROR,

vs.

D. P. TARPEY, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS AND AFFIRM.

MOTION TO DISMISS.

The record does not show the jurisdiction. There *is* evidence that the improvements were reasonably worth $8,500 in September, A. D. 1883, and that said improvements were worth $6,000 at time of trial.

But, the matter in dispute here is the leasehold estate of defendant in error. By the terms of the lease, the estate of defendant in error will terminate in August, A. D. 1890.

The jurisdiction of the court must depend upon the value of the leasehold interest, from October 26th, 1887, the date of the verdict, until August, A. D. 1890. There is no evidence in the record of such value, except the verdict of the jury awarding damages for the use and occupation of the premises for over two years, in the sum of $500.

But having color of right to dismiss, we also submit a

MOTION TO AFFIRM.

The questions presented by the record, as stated in the opinion of the Supreme Court of the Territory, are as follows:

1. That the acts of Congress do not convey the title to the railroad company.

2. That the lands were not conveyed by the original company, and the articles of association, etc., put in evidence, are not sufficient to pass the title.

3. That the laws under which the several companies were organized, were not proved, etc.

It will be observed that the second specification of error,—page 36, Record,—was not presented in the lower court, as on a former appeal in the same case that question was decided adversely to plaintiff in error.

Pacific Reporter, Vol. 14, p. 338.

It seems manifest from this record that the writ of error was taken for delay only.

The first question, *i.e.*, that the railroad land acts are not grants *in presenti*, is not open for discussion here. If there is a question that has passed from the realm of controversy into the domain of final judgment, this is that question.

The second point is absolutely frivolous, as an inspection of the record discloses. See Opinion of the Court, Record, pages 32 and 33.

The third and last question presented by the record on behalf of the plaintiff in error, arises upon the objection to the introduction of the several articles of amalgamation, etc., because, as it alleged there was no evidence of the *de jure* or *de facto* existence of the several companies, or that the articles were authorized by law.

See Record, page 16.

As to this we say:

1. By the act of July 2d, 1864, all of the companies authorized to participate in its benefits, were authorized to consolidate; and upon consolidation, were entitled to receive all the grants, benefits, etc., conferred.

13 Statutes at Large, 356.

By amendatory act of March 3, 1865, recognition of the corporate status of Central Pacific R. R. Co., of California, and Western Pacific R. R. Co., is found, and an assignment by one to the other is ratified and confirmed.

13 Statutes at Large, 504.

By Act of May 7th, 1878, full recognition of the incorporation of the various companies and of the existence of the lessor of the plaintiff is found.

20 Statutes at Large, 56.

In October, 1870, *after* the several transfers and amalgamations set out in the record, the lessor of the plaintiff *mortgaged* the lands granted to the original company, and the Interior Department recognizes it to be the legal owner and beneficiary under the acts of Congress.

See opinion Secretary Teller, March 14, 1883, Decisions Interior Department, Vol. 2, 477.

Every month patents for these granted lands are being issued to the Central Pacific R. R. Co.

The court in prevailing and dissenting opinions, has fully recognized the existence, actual and legal of the lessor of the plaintiff.

Sinking Fund Cases, 99 U. S. 730,-750.

2. Since the creation of the present corporation known as the Central Pacific Railroad Company, in August, 1870, that company has received all the benefits, enjoyed all the privileges, and been subjected to all the obligations imposed by the Land Grant Acts. Its relations to the General Government have been the subject of legislation and judicial discussion for a decade. Its organization and existence is a matter of public history of which all men and all tribunals take notice. As said by a circuit court, "All the companies that have built roads under these land grants have been treated by the United States Government, and the State of California, as having acted in pursuance of the laws both of Congress and the State."

Southern Pacific R. R. Co., vs. Poole, 32 Fed. Rep. 456.

To question the existence of the lessor of the plaintiff, or its right to dispose of its property, is, simply to *make* an objection. This court would not hear argument in support, and consequently may properly dispose of the matter upon this motion. The opinion of Justice Hendersen, set out in the record, clearly and satisfactorily disposes of the case.

Respectfully submitted,

CHAS. S. VARIAN,

Attorney for Defendant in error.

Office Supreme Court U. S.
FILED,
NOV 23 1891
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE DESERET SALT COMPANY,
Plaintiff in Error,

vs.

D. P. TARPEY.

No. 96.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

BRIEF FOR DEFENDANT IN ERROR.

This is a writ of error to the Supreme Court of the Territory of Utah. The original action is a suit in ejectment in which Tarpey is plaintiff and the Deseret Salt Company is defendant.

The action was commenced October 17, 1885, in the First District Court of the Territory of Utah. It has been twice tried in that court.

The claim of Tarpey is for the possession of a piece of land bordering on the Great Salt Lake, and for rents, issues, and profits.

The land, the possession of which is claimed, is thus described in the complaint:

"Northwest quarter of fractional section nine (9), in township eleven (11) north, range nine (9) west, Salt

Lake base and meridian, and the northeast quarter and the southwest quarter of said section, in part covered with water; in all three hundred and eighty acres, more or less."

A plat of the section is found between pages 8 and 9 of the transcript of record.

The land is desert, agricultural, or grazing; *not mineral* land.

One Barnes went into possession of the land in 1875. He erected works and machinery for raising water from the Great Salt Lake into reservoirs partly natural and in part artificial, for the purpose of producing salt by evaporation.

In 1883 Barnes conveyed all his property and improvements to the Deseret Salt Company, and surrendered to it the possession of the land. The Deseret Salt Company were in possession of the land when this action was brought.

At the first trial, in support of his title to the possession of the land, Tarpey offered a deed of the demanded premises.

The presiding judge ruled the deed inadmissible by reason of informalities.

Tarpey then offered the deed as evidence of a contract for the sale of the land. This offer was rejected. Tarpey then offered a lease of the premises, the same found on page 5 of the transcript of record. This offer was likewise rejected, and thereupon Tarpey suffered a non-suit and the case was taken to the Supreme Court of the Territory of Utah upon Tarpey's exceptions.

The Supreme Court of the Territory of Utah (5 Utah, 205; s. c. 14 Pacific Reporter, 338) sustained the ruling rejecting the deed, but reversed the ruling rejecting the lease, and the case returned to the District Court for a new trial.

This preliminary history of the case is important be-

cause it shows that the highest court of the Territory has overruled the objection of the Deseret Salt Company, made again at the second trial, that a lease is not, under the code of the Territory, sufficient evidence to sustain a verdict in ejectment where the petition alleges that the plaintiff "is seized as of fee and entitled to the possession" of the land in controversy.

At the second trial in the District Court, in support of his action, Tarpey relied upon the following facts as the source of his title:

First. An act of Congress granting lands to the Central Pacific Railroad Company of California, July 1, 1862, 12 Stat. at Large, 489, and the acts amendatory thereof.

By this act the Central Pacific Railroad Company of California was granted alternate odd numbered sections lying within the limits of the grant.

Second. Tarpey proved the incorporation of the Central Pacific Railroad Company of California, June 27, 1861 (p. 9, transcript of record).

Third. It was stipulated by and between the parties that the map of definite location of the line of the Central Pacific Railroad Company of California was filed and accepted, as required by the acts of Congress, on the 20th day of October, 1868, and that the land in controversy in this action is an alternate section within ten miles from said line of railroad (p. 5, transcript of record).

Fourth. It was proved that the lands were not such as were included in the reservations and exceptions contained in the act of Congress, July 1, 1862, 12 Stat. at L. 489; that they were not mineral; had not been preempted or otherwise disposed of (pp. 22 and 31, transcript of record).

Fifth. The amalgamation and consolidation of the "Central Pacific Railroad Company of California" and

the "Western Pacific Railroad Company," by articles of association and amalgamation, dated June 22, 1870; the new or consolidated corporation being known as the "Central Pacific Railroad Company" (p. 10, transcript of record).

Sixth. The amalgamation and consolidation of the "Central Pacific Railroad Company," the "California and Oregon Railroad Company," the "San Francisco, Oakland, and Alameda Railroad Company," and the "San Joaquin Valley Railroad Company," by articles of association and amalgamation, dated August 20, 1870. The new company was also called the "Central Pacific Railroad Company" (p. 16, transcript of record).

Seventh. The selection by the "Central Pacific Railroad Company," for patent, of a portion of the lands, viz., the northwest quarter of the northeast quarter, and the northwest quarter of the southwest quarter, and the northwest quarter of section nine (9), in township eleven (11) north, range nine (9) west, Salt Lake meridian (page 8, transcript of record). Said selection was filed in the land office at Salt Lake City in 1885, these parts being the only lands in said section as to which the costs of surveying, selecting, and conveying had been paid. (*Id.*)

Eighth. The "Central Pacific Railroad Company" mortgaged the land in controversy October 1, 1870, to trustees to secure the payment of its bonds (p. 4, transcript of record).

Ninth. A lease, dated August 7, 1885, from the "Central Pacific Railroad Company" to the plaintiff, demising the land in controversy to him for the term of five years from January 1, 1886 (p. 2, transcript record).

The Deseret Salt Company made no claim to title save that of *possession*.

To the introduction of these several pieces of evidence, and to the giving of certain instructions to the jury, and the declining to give certain instructions requested by it, the Deseret Salt Company filed exceptions.

The verdict of the jury was for Tarpey.

After motion for new trial made in and overruled by the District Court, the case went to the Supreme Court of the Territory of Utah on these exceptions. That court overruled the same and sustained the judgment of the District Court in Tarpey's favor.

To this action of the Supreme Court the Deseret Salt Company have brought this writ of error.

ARGUMENT FOR DEFENDANT IN ERROR.

The ultimate question for consideration is, whether upon evidence relied on by Tarpey and admitted by the District Court action for possession of the land can be sustained.

The specific objection to the admission of the lease by the Deseret Salt Company is "that there was a variance between the proof offered and the allegations in the complaint, in that the plaintiff had alleged seizing in fee to the demanded premises and sought to prove an estate as lessee under said lease for a term of five years only." (P. 8, transcript of record.)

The presiding judge instructed the jury that upon this title the plaintiff might maintain the action. (Instructions, p. 24 of the transcript of record.)

To this instruction defendant excepted. (Page 25 of the transcript of record.) This ruling the Deseret Salt Company assigned as an error in a motion for a new trial. (P. 27, transcript of record, "First—d.")

The Supreme Court having sustained the ruling of the District Court, the Deseret Salt Company assign this as error. (P. 36, transcript of record—"First").

The Deseret Salt Company insist before this court that such admission was error. (Brief of counsel, p. 4, item 5.)

It is evident that if all the other propositions of fact and law be resolved in favor of Tarpey, unless within the Territory of Utah, an action of ejectment can be sustained upon a lease for a term of years, although the plaintiff avers a title in fee simple, this action can not be sustained.

I.

Assuming, then, Tarpey's right to maintain the action so far as all other questions are concerned, can he maintain ejectment in the Territory of Utah on a lease for a term of years when he declares on a higher title?

Such an action may be maintained on a lease for a term of years.

"With respect to the *title*, a party having a right of entry, whether his title be in fee simple, fee tail, or in copy-hold, or for life, or *years*, may support an action of ejectment."

1 Chitty's Pleading, 188 (*189).

This proposition will not be controverted.

The opinion of the Supreme Court of the Territory of Utah sustaining the verdict (p. 30, transcript of record) does not discuss this question.

The reason is that the court when this action was first before it settled this question in favor of the plaintiff.

Tarpey *v.* The Deseret Salt Co., 5 Utah R., 205; s. c., 14 Pacific Reporter, 338.

So much of the opinion as relates to this matter is as follows:

"The next alleged error was the refusal of the court to admit the lease offered in evidence by the appellant.

The present is an action somewhat in the nature of an ejectment, and in every such action the rule is established that the plaintiff must recover upon the strength of his own title. It is the right of possession as between the parties that is tried and the right of possession is the title. (Marshall *v.* Shafter, 32 Cal., 176.) The abstract right to the soil is not tried, but the action is to recover the actual possession. (Adams' Ejectment, 32–34; President &c., of Cincinnati *v.* White's Lessee, 6 Pet., 431.) The plaintiff must show a right in himself before the defendant under a simple denial is called upon to make any proof or showing on its part. And even then, the defendant may confine himself to merely rebutting the evidence of the plaintiff. It need not show that it has any title whatever. To show that the plaintiff had no title or interest entitling him to the possession is sufficient. (Coryell *v.* Cain, 16 Cal., 572; Moore *v.* Tice, 22 Cal., 516; Adam's Ejectment, 337–380 and notes.) The title is the plaintiff's legal or actual right to the possession of the property. A claimant in fee might not own the land, or have absolute fee in it, but the circumstances may be such that, as between the parties, the title in him is established. The plaintiff need not show a title in him good against all the world. (Tyler's Ejectment, 165–6.) The lease is not an equitable title. It is not the title in fee, but it is of the same nature yet of a less estate only of a lower grade. It is embraced in the fee and is in subordination to it. The fee title includes the title to the possession. A party may convey a part of his right to the possession. The appellant alleges his right to the possession. He also alleges his title in fee. Under this state of the case, the question arises whether the appellant, because he can not prove his ownership in fee, shall be denied the right to his legal right to the possession. He has not proved all that he has alleged—all of his title, but he has offered to prove his right of possession, and the right to the possession is a sufficient ground upon which to base this action. (Toland *v.* Mandell, 38 Cal., 43.)

"Under the averments of the plaintiff, we see no reason why the appellant might not introduce evidence to show that he was entitled to a less estate than a fee—to show his right of entry and possession. (Tyler's Ejectment, 168–70; Stark *v.* Barrett, 15 Cal., 361; Marshall *v.*

Shafter, 32 Cal., 195; Gillespie *v.* Jones, 47 Cal., 263; Day *v.* Alverson, 9 Wendell, 223.) The lease was offered to show title in the appellant. It purports to have been made by the Central Pacific Railroad Company, and recites that the said company had caused the lease to be signed by the land agent and secretary of the grantor. And that it had caused the coporate seal of the grantor to be affixed. That which purported to be the seal of the said company was affixed to the lease.

"The lease was sufficiently proven to have been executed by authority, and to be *prima facie* the act of the company. This entitled it to have been admitted in evidence to show the appellant's right to the possession. It was error to exclude it. It is claimed that the recital in the lease that actions for possession should be in the name of the railroad company precluded the institution of the action by the plaintiff appellant. The lease was intended to convey to the appellant a full title of possession as against the railroad company and all the world. It is therefore the real party in interest, and the code of civil procedure provides that the action shall be prosecuted in the name of the real party in interest, except where otherwise provided. It is nowhere otherwise provid d that an action of this character shall be instituted in the name of any one not having the title to the possession. That title was not in the railroad company. It was alone in the appellant.

"The recital in the lease did not pertain to the issue, as to the possession, but was a collateral matter affecting only the appellant and the railroad company. It did not affect the respondent.

"For the error of excluding the lease, the judgment of the lower court is reversed and the case is remanded to be proceeded in accordance with this opinion."

Being a question of practice and procedure, and having been settled by the Supreme Court of the Territory of Utah, this court will not reverse the decision of that court.

Sweeney *v.* Lomme, 22 Wall., 213.

It is to be noted that counsel for the plaintiff in error cites no authorities in support of his objection.

All the other assignments of error by the Deseret Salt Company relate to the title of Tarpey's lessor, the "Central Pacific Railroad Company."

Certain facts were either admitted by the parties or proved without objection:

1. Plaintiff proved the incorporation of the Central Pacific Railroad Company, of California, June 27, 1861." (P. 9, transcript of record.)

2. "It was stipulated by and between the parties that the map of the definite location of the line of the Central Pacific Railroad Company of California, was filed and accepted as required by the acts of Congress, on the 20th day of October, 1868; and that the land in controversy in this action was in an alternate section within ten miles from said line of railroad." (P. 4, transcript of record.)

Being section 9 it was "an alternate odd section."

Tarpey "offered and introduced without objection," a copy of the official plat of the Government survey of said fractional section described in plaintiff's complaint." (See "Exhibit 3," between pages 8 and 9 of the transcript of record).

Thus the corporate organization of the Central Pacific Railroad Company of California; the legal location of its line; that the land in controversy is within ten miles of said line, and is an alternate section, "designated by an odd number," in accordance with the act of Congress of July 1, 1862, section 3, 12 Stat. at L., page 492, were either proved or admitted without objection.

In further support of the evidence of title to this particular alternate odd section, Tarpey offered selection list "No. 6 of lands selected for patent by the Central Pacific Railroad Company, and filed in the land office at Salt Lake City, in 1885, which selection included all the surveyed land contained in section 9, in township 11 north,

range 9 west, Salt Lake meridian, to wit, the northwest quarter of the northeast quarter, the northwest quarter of the southwest quarter and the northwest quarter of said section" (p. 8, transcript of record).

The Deseret Salt Company objected to the admission of this selection list; the objection was over ruled and exception was taken.

But in the motion in the District Court for a new trial the Deseret Salt Company did not assign this ruling as error (p. 27, transcript of record).

Nor is any assignment of error in this particular found in the Deseret Salt Company's assignments of error to the Supreme Court of the Territory of Utah (pp. 36 and 37, transcript of record).

The ruling admitting the selection lists is not before this court.

Tarpey further proved (p. 9, transcript of record), "that the east, west, and north section lines of said section nine had been surveyed by the United States in A. D. 1871; that subdivision of sections of the public lands are never surveyed by running interior lines; that said section lies on the shore and on the north of the great Salt Lake, and that the south or meander line of said section nine had not been run."

The register of the United States land office at Salt Lake City produced the official plat of section nine, described in the complaint. He testified that a duplicate of selection list No. 6 had been forwarded to the General Land Office, for the approval of the Commissioner thereof, but, so far as he was advised, no action had been taken.

A draftsman in the office of the surveyor general of Utah Territory identified the field-notes of that portion of said fractional section nine which had been surveyed; and testified that from these notes it appeared that only so much of said fractional section had been surveyed for patent as was contained in selection list No. 6, and

that the same had been returned into the surveyor general's office as *agricultural land* (p. 9, transcript of record).

To the foregoing testimony there was no objection.

The foregoing facts clearly fix the identity of the section of whose possession Tarpey sought to gain.

The testimony that the section was returned into the surveyor general's office as *agricultural* lands certainly warranted the instruction to the court on that point (page 25 of the transcript of record, instruction 4), which in its motion for a new trial in the District Court the Deseret Salt Company alleged as error (p. 28, transcript of record "d") and which it now seeks to sustain as error to the Supreme Court, (p. 37, transcript of record sixth. Brief of counsel of plaintiff in error, p. 4.)

There is other evidence bearing on the character of the land as being either agricultural or mineral, but as no exception was taken to the instructing of the judge presiding in the District Court of the Territory on this point, this court must assume that the jury correctly found that the land was not mineral within the meaning of the act of Congress granting land, and also that in all other respects it was not within the exceptions there provided for.

The fourth instruction as to the effect of the designation of these lands must be sustained on the authority of Heath *v.* Wallace, 138 U. S., 573. This question was properly determinable by the Land Department.

The third instruction was certainly correct and needs no authorities to support it.

The fourth allegation of error found in the Deseret Salt Company's brief is not only general, but is not found in the assignment of errors.

The fourth instruction is unobjectionable in every respect in the light of the facts proved and admitted.

The remaining errors mentioned in the brief of counsel of the Deseret Salt Company are as follows: In holding—

"1.—That there was any evidence showing the existence of such a corporation as the Central Pacific Railroad Company." (P. 3 of brief.)

"2.—In holding that the evidence introduced showed a transfer of the title of the Central Pacific Railroad Company of California of the lands in controversy to the plaintiff's lessor, the Central Pacific Railroad Company." (P. 4 of brief.)

"3.—In holding that the evidence established that the Central Pacific Railroad Company of California, or the plaintiff's lessor, the Central Pacific Railroad Company, ever had title to said land." (P. 4 of brief.)

"6.—In admitting in evidence over the objection of the plaintiff in error, each of said papers purporting to be articles of amalgamation and consolidation." (P. 4 of brief.)

"7.—In giving 'instruction 2.'"

"8.—In refusing to give the instructions set forth requested by the plaintiff in error and referred by the court, designated 'second.'"

They may be decided generally as follows:

First. Did the act of Congress, July 1, 1862, 12 Stats. at L., 489, and the act amendatory thereof, approved July 2, 1864, convey to the Central Pacific Railroad Company of California the title to the land in controversy *in presenti?*

Second. By the amalgamation and the contract between the Central Pacific Railroad Company of California and the "Western Pacific Railroad Company," and also between the "Central Pacific Railroad Company" thus formed and the "California and Oregon Railroad Company," the "San Francisco, Oakland and Alameda Railroad Company," and the "San Joaquin Valley Railroad Company," did the legal title to the land granted by Congress come to the Central Pacific Railroad Company, the lessor of Tarpey?

If such amalgamations took place and the evidence offered in support of the fact was legally admissible, then there was no error in the judgment.

Did the act of Congress of July 1, 1862 (12 Stat. at L., 489), convey to the Pacific Railroad Company of California the title to the land in controversy *in presenti*?

Did the act of Congress of July 1, 1862 (12 Stat. at L., 489), convey to the Pacific Railroad Company of California the title to the land in controversy *in presenti*?

This question has been answered in the affirmative by this court in many cases. Such grants are *in presenti*, and pass the title to the odd sections designated to be afterwards located. When the route is fixed their location became certain, and the title, which was previously imperfect, acquires precision and becomes attached to the land.

Shulenberg *v.* Harriman, 21 Wall., 44;
R. R. Co. *v.* United States, 92 U. S., 733;
R. R. Co. *v.* R. R. Co., 97 U. S., 491.
R. R. Co. *v.* Baldwin, 103 U. S., 426;
Grinnell *v.* R. R. Co., 103 U. S., 739;
Wright *v.* Roseberry, 121 U. S., 488;
Irwin *v.* San Francisco Savings Bank, 136 U. S., 578, affirming Wright *v.* Roseberry, *supra*;
Tubbs *v.* Wilhoit, 138 U. S., 134;
St. Paul and Pacific R. R. Co. *v.* Northern Pacific R. R. Co., 139 U. S., 1.

The brief of the Deseret Salt Company cites—
Railway Co. *v.* Prescott, 16 Wall., 603;
Railway Co. *v.* McShane *et al.*, 22 Wall., 444;
North Pac. R. R. Co. *v.* Traill County, 115 U. S., 600.

Mr. Justice Field, in Denny *v.* Dodson, 32 Fed. Rep.,

899, shows there is no real conflict between the opinion in North Pac. R. R. Co. *v.* Traill (*supra*) and the other cases cited above. At least five of the above-cited cases have been decided since that case.

There is no error in instruction No. 1.

Second. By the amalgamation between the "Central Pacific Railroad Company of California," and the "Western Pacific Railroad Company," and also between the "Central Pacific Railroad Company" thus formed, and the "California and Oregon Railroad Company," the "San Francisco, Oakland and Alameda Railroad Company," and the "San Joaquin Valley Railroad Company," did the legal title to the lands granted by Congress come to the "Central Pacific Railroad Company," the lessor of Tarpey.

The company formed by this last amalgamation took the name of the Central Pacific Railroad Company, and from it came the lease under which Tarpey claims possession.

When the first contract of amalgamation was offered the Deseret Salt Company objected "to the said offer, that the said articles were irrelevant and immaterial, for the reason that there was no evidence that the corporations mentioned in said articles as amalgamating had ever been organized, or to be in fact in existence, or that said documents purporting to be articles of consolidation had any validity or were authorized by the laws of the Territory of Utah, or any other competent authority."

This objection offered at the trial is reduced to two: (1) that there was no evidence that these several corporations existed; (2) that the amalgamations had never been authorized by competent authority.

It is important to note the specific objection, as it will be seen hereafter that the Deseret Salt Company now seek to raise other and distinct issues not made at the trial, viz., that there is no evidence of the acknowledg-

ment and recording of their instruments in accordance with the provisions of the laws of the Territory of Utah then in force and cited by the counsel on pages 3, 5, and 6 of his brief.

The corporate organization of the Central Pacific Railroad Company of California, in which was the title of these lands, by acts of Congress had already been proved (p. 9, transcript of record).

Not only was the corporate existence of the Central Pacific Railroad Company of California proved, but the court was bound to take notice of the acts of Congress recognizing the Central Pacific Railroad Company, the lessor of Tarpey; and also of each of its constituent companies.

The existence of these corporations and their amalgamation was fully recognized by Congress May 7, 1878, (20 Stats. at L., p. 56.)

Congress dealt with the Central Pacific Railroad Company "formed by these amalgamations as a valid corporation," reciting the fact of amalgamation.

* * * * * * *

It would be difficult to understand, when the grantor of these lands sees fit to recognize an amalgamation which in terms transferred to the Central Pacific Railroad Company the title, why a mere stranger should be permitted to controvert it.

* * * * * * *

By the act of July 2, 1864, all of the companies authorized to participate in the benefits of the act were authorized to consolidate, and upon consolidation, were entitled to receive all grants, benefits, etc., conferred by the acts.

Act 1864, Sec. 16, 13 Stat. at L., 356.

By amendatory act of March 3, 1865, an assignment by the Central Pacific Railroad Company of California to the Western Railroad Company was ratified and con-

firmed with all the privileges and benefits of the several acts of Congress.

13 Stats. at L., 504.

May 21, 1866, time for the construction of the "Western Pacific Railroad" was extended.

14 Stats. at L., 356.

Later legislation relative to taxation of laws granted for the companies and the investigation of their affairs also recognizes the lessor of plaintiff as the *successor* to the original grantee.

Statutes at Large vol. 24, 143–490.

In the Sinking Fund cases the Supreme Court, in prevailing and dissenting opinions have fully recognized the existence, actual and legal, of the lessor of plaintiff.

99 U. S., 730–750.

The Interior Department recognizes plaintiff's lessor as the legal owner and beneficiary under the acts of Congress.

See opinion of Secretary Teller, March 14, 1883. Decisions Interior Department vol. 2, pp. 477–489.

Opinion Acting Secretary Muldrow, May 26, 1887—Manuscript Document. In "Appeal of Central Pacific R. R. Co."

The Department has patented lands to company, as per patents on file in land office, as follows:

List 39, Sept. 16, 1884, 76,101.91 acres; List 45, July 27, 1885, 642.72 acres; List 46, Dec. 17, 1885, 11,745 acres; List 47, July 17, 1886, 12,193.37 acres; in all, 130,693.89 acres.

The court takes judicial notice of the public and *private* acts of the Interior Department.

Utah Laws, 1884, p. 357, sec. 1,149;

U. S. *v.* Williams (Mont.), 12 Pac. Rep., 854.

It would be difficult to conceive a stronger proof of the *de facto* existence of these several corporations.

Likewise is the proof of their amalgamation.

It was not necessary to show that the amalgamation "was authorized under the laws of the Territory of Utah" or "any other competent authority."

The Deseret Salt Company was in no position to make this objection. If there was an amalgamation in fact unless it was prohibited by some express law of the Territory of Utah or by some settled rule of public policy of that Territory, the comity which exists throughout the States and Territories will uphold the consolidation.

Amalgamation *de facto* is certainly shown by the instrument, and the question of authority to amalgamate if denied ought to be shown by the objector. Under the circumstances of this case the *de facto* existence of the corporation is all that is required and is proved by the foregoing facts.

Morrowwitz on Corporations, 746, 750, 776, 777, 778.

The several instruments of amalgamation bear the seals of the several companies, the official signatures of their officers, the ratification of their stockholders, and the certification of the officers of the State of California where contracts were consummated.

The Deseret Salt Company made no objection to the *form* of this evidence and likewise none to the amalgamation except that the corporation had no existence or were not shown to have been authorized to so act. The Deseret Salt Company was not a party to the amalgamation.

The exigencies of the Deseret Salt Company have caused it to raise another claim and that is that it is not shown that these articles of amalgamation were witnessed, acknowledged, and recorded in accordance with certain Territorial laws. Counsel have cited the statute

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at length and call the attention of the court to Neslin *v.* Wells, 104 U. S., 428. To this we reply, that it can not be permitted to argue that as error which it did not specify at the trial in its exceptions or in the assignments of error. The transcript of the record does not disclose such an objection.

As we have already pointed out, the objection made at the trial does not even by implication embrace this.

No more apt words could have been used by the parties to accomplish the amalgamation in respect to the real estate. Article first (p. 11, transcript of record), is as follows:

"The said companies, parties hereto, agree to and by these presents amalgamate and consolidate the capital stock, debts, property, assets, and franchises of each of said companies, the parties hereto of the first and second parts, into one company and corporation; and all the capital stock, debts, property, assets, and franchises in or to which said companies, the parties hereto, or either of them, have any right, title, interest, or claim, either in possession or expectancy at law or in equity, or which may in any way relate or pertain to the said companies, parties hereto, or either of them, *are* amalgamated, united, merged, and consolidated into one company or corporation."

See also article seventh (p. 13, transcript of record).

The Deseret Salt Company does not claim under the Central Pacific Railroad Company of California, or of any company formed by the amalgamation. The Deseret Salt Company was in no way in privity with them.

This property became that of the Central Pacific Railroad Company by force of the amalgamation and needed no other conveyance or record.

"The effect of consolidation, generally speaking, is to put an end to the old corporations and create a new one. A new entity is created to which pass the combined rights and obligations of the old ones. The general rule,

as to the effect of consolidation, is laid down in Paine *v.* Lake Erie and Louisville R. R. Co., 31 Ind. 283, 349, where it is said: 'It is clear to our minds that the new company succeeded to the rights of the old corporations. The new was composed of the elements of the old; it was the same under a new form. It is only a play upon words to say that, phœnix-like, the new arose from the ashes of the old. There was no turning to ashes required. It only required a commingling of the elements of which the old was composed. The new assumed the liabilities and succeeded to the rights of the old.' The court, therefore, decide that the new company may compromise and settle a claim against one of the original companies and sustain an action to enforce a settlement. Similarly, in Miller *v.* Lancaster, 5 Coldw. (Tenn.), 514, 520, after citation of many authorities, it is said: 'The foregoing authorities suffice, if any were needed, to establish the position that where such consolidation and merger of corporations are made, and such transfer of rights and properties and assumption of liabilities between the old and new companies are effected, the new company stands in the stead of the old companies, and may enforce the rights of the old companies and be subjected to their liabilities.' See also Columbus R. R. Co. *v.* Powell, 40 Ind., 37; Chicago, &c., R. R. Co. *v.* Moffit, 75 Ill., 524; Thompson *v.* Abbott, 61 Mo., 176; Zimmer *v.* State, 30 Ark., 677. It would seem, therefore, that all choses in action belonging to the old companies could be enforced by the new, in the same way and to the same degree. And, indeed, it might be said that all the rights were transferred and could be exercised as before." See also Philadelphia, etc., R. R. Co. *v.* Maryland, 10 Howard, 376; Clearwater *v.* Meredith, 1 Wall., 25; Indianapolis, Cincinnati and Lafayette R. R. Co. *v.* Jones, 29 Indiana, 465.

McMahan *v.* Morrison, 16 Ind., 172.

Whether or not these several corporations had authority to amalgamate, or whether they had authority to acquire and hold real estate, are questions concerning which the Deseret Salt Company is not in a position to complain.

The objection to the admissibility of the instruments of amalgamation may well be answered by the application of the maxim *omnia presumuntur rite et solemniter esse acta.*

Bank of the United States *v.* Dandredge, 12 Wheat., 64.

The question of authority on the part of the corporation was purely a collateral one in this case. The defendant was in no situation to attack their passed and fully executed contracts, at least without showing they were wholly and absolutely void.

Devlin on Deeds, § 21;
Natoma Water Co. *v.* Clarkin, 14 Cal., 544;
Banks *v.* Poitcaux, 15 Am. Dec., 706.

The rules are the same as to foreign corporations. The power and the right of a foreign corporation to hold and convey property is not to be determined under the laws of the home governments under which they are organized, but it is to be determined by the laws of the governments in which they are doing business and in which they acquire property.

Runyon *v.* Carter's Lessees, 14 Pet., 121;
Lumbard *v.* Aldrich, 28 Am. Dec., 381.

If the court can possibly come to the conclusion that the land did not come to the Central Pacific Railroad Company by the amalgamation, then the several acts may well be considered a re-incorporation of the Central Pacific Railroad Company of California in each instance under the name of the Central Pacific Railroad Company (*vide* opinion of Henderson, J., pp. 33 and 34, transcript of record).

There is no ground for sustaining the writ of error.

W. H. H. Miller.
John B. Cotton.

Office Supreme Court U. S.
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CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE DESERET SALT COMPANY,
Plaintiff in Error,

vs.

D. P. TARPEY.

No. 96.

STATEMENT OF FACTS.

This is a writ of error to the Supreme Court of the Territory of Utah, in the matter of a complaint in ejectment in which D. P. Tarpey is plaintiff, and the Deseret Salt Company, is defendant. The action was commenced January 13, 1888, in the First District Court of the Territory; trial by a jury had and a verdict for plaintiff rendered. The case was taken to the Supreme Court of the Territory on exceptions to certain rulings of the presiding judge, hereinafter considered. The Supreme Court sustained the rulings of the District Court, whereupon the plaintiff in error, originally the defendant, sued out this writ of error.

The suit was for the possession of a piece of land described in the complaint, and for rents, issues, and profits.

A plat of the land is found between pages 8 and 9 of the record. The land is the northwest quarter of frac-

tional section 9. The easterly and southerly portion of the section is covered by the waters of the Great Salt Lake. In his complaint, the plaintiff says that he "is seized as of fee and entitled to possession" of the land.

The proof is that the land was desert, agricultural or grazing land, *and not mineral land*.

One Barnes went into possession of the land in 1875, constructed works and machinery for raising water from the Great Salt Lake into reservoirs, partly natural and partly artificial, for the purpose of producing salt by evaporation. In 1883 Barnes sold and transferred all his property and improvements to the defendant, and surrendered possession of the land to that company. There was evidence tending to prove that the land described in the complaint "was so strongly impregnated with alkaline and saline matter as to render it wholly unfit for agriculture, so as to prevent the growth of vegetation thereon."

The fact is, however, that the production of salt was from water pumped from Great Salt Lake into evaporating ponds.

The plaintiff's title is derived as follows: The map of the definite location of the line of the Central Pacific Railroad Company, of California, was filed and accepted, as required by the acts of Congress, on the 20th day of October, 1868. The land in controversy is an alternate section within ten miles from said line.

The plaintiff introduced a mortgage or deed of trust of all the lands belonging to the Central Pacific Company, a railroad corporation organized pursuant to the laws of the State of California, party of the first part, and Charles Crocker, *et al.*, of California, parties of the second part, the mortgage or trust deed being duly acknowledged and marked as recorded in Brigham City, March 12, 1873. This deed purports to secure the bonds of the company.

Plaintiff also offered in evidence a lease, dated the 7th day of August, 1875, between the Central Pacific Railroad Company and the plaintiff, which lease is found in Exhibit 2, page 5, of the record. The land in question is included within the terms of said lease, which is for the term of five years. Plaintiff also offered in evidence Selection list, No. 6, of lands selected for patent by the Central Pacific Railroad Company, and filed in the land office at said Salt Lake City, in 1885. This selection included only the surveyed lands contained in section 9, in township 11 north, range 9 west, Salt Lake meridian, to wit: The northwest quarter of the northeast quarter, and the northwest quarter of the southwest quarter, and the northwest quarter of said section. This list showed that the costs of surveying, selecting, and conveying the lands thus selected had been paid, but there was no evidence that any application had been made by the Central Pacific Company to select or have conveyed to it any other of the lands in said fractional section 9, nor that it had paid or tendered the cost of surveying, selecting, or conveying any other of the said lands.

The plaintiff also introduced 5 other Selection lists of lands in Utah by said company. The plaintiff also introduced an official plot of the Government survey of the fractional section described in his complaint. This plot is found between pages 8 and 9 of the record.

It was proved that the east, west, and north section lines of said section 9 had been surveyed by the United States in 1871; that subdivisions of sections of the public lands are never surveyed by running interior lines; that said section lies on the shore and north of the Great Salt Lake; that the south or meander line had not been run.

The Register of the United States Land Office at Salt Lake City, sworn for the plaintiff, produced the official

plot on file at said office, of section 9, described in the complaint. He also testifies that the duplicate of said Selection list, No. 6, had been forwarded to the General Land Office for the approval of the Commissioner thereof; but that so far as he was advised, no action had been taken.

The plaintiff also produced a witness, an assistant draughtsman in the office of the Surveyor General of Utah Territory, who was familiar with the official plats of the surveys of public lands made in said Territory. He identified the field notes and official plat of the survey of that portion of fractional section 9 which had been surveyed. He testified that it appeared from said field notes and plat that only so much of said fractional section had been surveyed for patent as was contained in Selection list No. 6; that the same was returned into the surveyor general's office as agricultural lands.

Plaintiff proved the incorporation of the Central Pacific Railroad Company, of California, in June 27, 1861; he also offered in evidence a document purporting to be articles of association, amalgamation, and consolidation of the Central Pacific Railroad Company, of California, and the Western Pacific Railroad Company. These articles are found on pages 10 *et seq.* of the transcript of record; plaintiff also offered in evidence articles of association, amalgamation, and consolidation of The Central Pacific Railroad Company, the California and Oregon Railroad Company, the San Francisco, Oakland and Alameda Railroad Company, and the San Joaquin Valley Railroad Company, bearing date of August 20, 1870. This evidence is found on pages 16 *et seq.* of the transcript of the record.

The instructions given and refused on behalf of both parties are found on pages 23 *et seq.* of the record.

The errors assigned by the defendant are found on pages 36 *et seq.* of the transcript of record.

STATEMENT OF ERROR.

The essential question presented for the determination of the court is whether the evidence presented by the plaintiff makes out a *prima facie* title in the plaintiff upon which he can recover in an action of ejectment. The substance of the defendant's objection may be thus stated:

First. That the acts of Congress referred to in the record do not convey the legal title *in presenti* to the railroad company; that in view of the things to be subsequently done, it is in the nature of a promise or grant *in futuro*; and until such things are done, there is no such legal title as is required to maintain ejectment.

Second. That the lands were not conveyed by the Central Pacific Railroad Company of California to the first amalgamated company, or by the first amalgamated company to the second, the language of the instruments put in evidence being insufficient to make such conveyance.

Third. That no conveyance of the premises is proved from the Central Pacific Railroad Company of California to the amalgamated companies, and by one to the other, and thence to the plaintiff, for the reason that the laws of the State of California were not shown or proved under which the amalgamated companies and the constituent companies were organized, showing their legal right to organize, hold, and convey property.

ARGUMENT FOR THE DEFENDANT IN ERROR.

I.

Do the acts of Congress convey a title *in presenti*, or are they merely agreements to convey *in futuro* on the doing of certain acts therein prescribed?

This question has been presented to this court under

other acts similar to that in question. The court has held that the title granted was a perfect legal title *in presenti*, as distinguished from one equitable or inchoate, arising upon a contract or promise of the Government.

Shulenberg *v.* Harriman, 21 Wall., 444;
Railroad *v.* The U. S., 92 U. S., 733;
Railroad Company *v.* Railroad Company, 97 U. S., 491;
Railroad Company *v.* Baldwin, 103 U. S., 426;
Grinnell *v.* Railroad Company, 103 U. S., 739;
Wright *v.* Rosenberry, 121 U. S., 488;
Rutherford *v.* Green's Heirs, 2 Wheaton, 196;
Denny *v.* Dodson, 32 Fed. Rep., 899.

II.

Do the articles of amalgamation convey from one company to the other the title to the land?

The language of the several articles of amalgamation in this regard is as follows: "And the said several parties, each for itself, hereby sells, assigns, transfers, grants, bargains, releases, and conveys to the said new and consolidated company and corporation, its successors and assigns forever, all its property, real, personal, and mixed, of every kind and description."

It is shown by the record that these instruments were properly recorded. More comprehensive language to effectuate a conveyance of the property of the company can hardly be conceived.

III.

To the objection that there was no proof of the laws of the State of California under which it is claimed that the various corporations were organized, it is replied that under the circumstances of this case the only proof of corporate existence that is required is that the corporation is one *de facto*.

The controversy is between third parties, and not between a State and the corporation or one holding under it.

The written instruments of the corporation under its seal, duly signed, acknowledged, and proved, as in the case at bar, are sufficient evidence of its *de facto* existence.

2 Morrowitz on Corp., 746, 750, 776–78.

It is said, however, that there is no proof of the *de facto* existence of the constituent companies that formed the amalgamated company. The land in question was conveyed by the United States to the Central Pacific Railroad Company, of California. This is sufficient evidence, both of the *de facto* and the *de jure* existence of *that* company.

That the position of the plaintiff in error is unsound is shown from the fact that the Central Pacific Railroad Company amalgamated with the Western Pacific Railroad Company, and together formed the Central Pacific Railroad Company, the title passing through this new company. If there be no sufficient proof of the existence of the Western Pacific Railroad Company, the act so done would be but a re-incorporation of the Central Pacific Railroad Company. The same course of reasoning applies to the subsequent amalgamation.

The existence of these companies is recognized by the act of Congress of May 5, 1878 (20 Stat. at L., 56). This also establishes their *de facto* existence.

There is no force in the objection that there is no proof that these corporations thus organized were legally entitled to hold lands. Such objection can only be taken by the sovereignty under which they were incorporated or acting. Such transfers are not void, but voidable. (2 Morrowitz, 648 to 653, inclusive; 709, 710, 711, and 746.) The plaintiff in error is not, therefore, in a position to object to these contracts of transfer unless he can show that they are void.